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Election vs. Appointment of Judges

LAMAR T. BEMAN, A.M., LL.B.
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THE REFERENCE SHELF

Volume IV Number 2

ELECTION *versus* APPOINTMENT OF JUDGES

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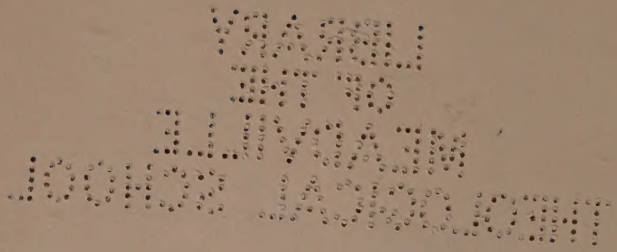

INTRODUCTION

Whether the judges of the courts should be elected by the people, as most of the states now provide, or appointed by the chief executive subject to the approval of the Senate, as the Federal judges have always been chosen is a question that has frequently been discussed at meetings of the bar associations and in the legal periodicals, and has been a point of contention in the recent constitutional conventions in several states. In 1915 the people of California voted on the question of changing from the elective to the appointive system and a similar suggestion was made in the constitutional convention in New York. In the Massachusetts constitutional convention of 1917-1918 there was a strong and unsuccessful movement to change from the appointive plan, which has always been used in that state, to the elective system. In 1924 the LaFollette Progressive Party adopted as one plank in its platform a demand that all Federal judges should be elected by popular vote, a reform that had been championed for many years by Walter Clark, the distinguished Chief Justice of the Supreme Court of North Carolina. In 1925 the association of Ohio police chiefs proposed a change in the state constitution to make all judges in the state appointive instead of elective. So it seems that whatever the system in vogue may be, there are always those who want a change, believing that a mere change in the form of government or method of selecting officials will remedy evils that are deep-seated and of long duration.

There are many possible variations in the system of choosing judges. They might be chosen by the legislature, as they are in a few of our states, appointed by the

chief executive without the approval of the Senate, appointed by the governor subject to recall by the people, and so on. There are other questions, difficult to separate from the method of selecting judges, such as the tenure of office and the salary best suited to the judiciary. So far as possible all of these questions are eliminated from this volume, so that the controversy between an elective and an appointive judiciary may be reduced to its lowest terms, clarified by the elimination of these other questions.

June 2, 1926. LAMAR T. BEMAN

CONTENTS

BRIEFS

RESOLVED: *That the appointment of the judges in this country by the chief executive of each jurisdiction is preferable to their election by popular vote.*

INTRODUCTION

I. The meaning of the question.
   A. In this question the relative merits of the two leading methods of choosing judges in this country are contrasted.
   B. This question considers only the method of selecting judges.
      1. The tenure of office of judges is entirely foreign to this question.
      2. Judicial salaries do not enter into this discussion.
   C. The question applies only to the regular judges.
      1. It does not include the justices of the peace or other petty judicial officers.
      2. It does not include those mayors of smaller cities or villages who also act as the police judge, as is true in several states.
      3. It does not include boards or administrative officers who occasionally exercise quasi-judicial powers, such as the Interstate Commerce Commission and state public utility commissions.

II. The importance of the question.
   A. The administration of justice in the courts of this country is now very unsatisfactory.
      1. The poor are denied an equal chance before the courts.

a. Clarence Darrow has repeatedly declared that it is only the poor who are executed or confined in the prisons, and that no murderer is ever executed if he is able to employ a good lawyer.
b. The cost of carrying litigation to the higher courts is so high as to be prohibitory to the poor.

2. The prolonged delays in getting a final decision from the courts very often amount to a denial of justice.
   a. It is now about three years since the Teapot Dome scandal became public but no one of those charged with bribery has yet even been brought to trial, and even if these people should be convicted the appeals will drag the matter along for many more years to come.
   b. The case of the city of Cleveland against the railroads involving the ownership of the lake front was before the courts for twenty-one years before a final decision was obtained.
3. These defects and abuses are at least a partial cause of the present crime conditions in this country.
   a. The United States now has more crime in proportion to its population than any other country in the world.
   b. There is now twice as much murder in this country in proportion to the population as there is in Italy, the second most murderous country.
   c. In most of the courts it is almost impossible to convict a person on a first degree murder charge, so that only

about one murderer in ninety is now executed in this country.

d. These conditions are the chief cause of lynching which has been our worst national disgrace.

B. Equal and exact justice, promptly and fairly administered, is the most vital and urgent duty of every civilized country.

AFFIRMATIVE

I. The selection of judges by popular election, the method now used in most of our states, has been a failure.

A. There are serious evils in the administration of justice in those states where the judges are chosen by popular vote.

1. Unqualified and inferior men are often elevated to the bench.

a. This is especially true in the larger cities.

(1) James Bryce said that years ago he saw in New York city a judge of the highest court who was an "ill-omened man, flashily dressed and rude in demeanor," whom "one might have taken for a criminal" holding court amid confusion and disorder.

(2) Such a spectacle may now be seen in most of our larger cities.

b. There are abler men practicing law in almost every county in America where the judges are elected by popular vote than sitting on the bench.

2. The ablest lawyers do not become judges under the elective system.

a. Every elective judge in America is inferior in legal learning to the ablest lawyers of his state or district.

3. The whole system is submerged in politics.
   a. Any lawyer who seeks an elective judgeship must become a politician.
   b. The successful politician is always a strong partisan and usually an adherent of a faction, class, or group.
   c. These affiliations create obligations which make it impossible for a man to be a good, fair-minded judge.
4. The elective bench is usually composed of men who are mere amateur judges, weak, biased, and undignified.
   a. Many of them are comparatively young men.
   b. Most of them lack independence, courage, learning, dignity, and standing.
   c. Many lawyers seek the elective bench while they are still young men with the determination to serve only a few years for the purpose of gaining experience, prominence, and reputation, and then resign to engage in private practice.
5. The laws are not adequately enforced.
   a. Many of the judges are lenient with criminals for the purpose of seeking the favor and support of the criminal class.
   b. The inexcusable delays in the administration of justice often work injustice.
   c. These things are at least a partial

cause of the crime wave that has swept over the country.

B. These evils are due to the selection of the judges by popular vote.
   1. The best lawyers will not go into the filth and mire of American politics.
      a. They absolutely refuse to run for any public office, while the undesirable members of the legal profession scramble for judicial honors in the party conventions and at the primaries and elections.
   2. The people are absolutely incapable of choosing by popular election the men best qualified to serve as judges.
      a. They do not have sufficient knowledge of the candidates and of their qualifications.
      b. They cannot judge of the integrity, fairness, and legal knowledge of the various candidates.
      c. The ablest, fairest, and best judges are frequently defeated when they are candidates for re-election.
         (1) This was true in the case of Judge Thomas M. Cooley of Michigan, one of the greatest legal minds this country has ever produced.
   3. In many cases popular election does not result in the choice of the judges by the people.
      a. The real choice of the judges is generally made either by the party boss or by party organizations.
      b. Sometimes choices are dictated by bar associations.

c. Popular elections are often dishonestly conducted, so that the man the people choose is counted out and kept off the bench.

4. Popular election robs the judge of his dignity and independence.
   a. Every elected judge is under obligations to many persons and interests that have aided him to obtain his office.
   b. No elected judge can be independent and fearless in his decisions.

II. Executive appointment is a wise and desirable method of selecting the judges.
   A. It will remedy the evils which popular election has created.
      1. It will bring abler and fairer men to the bench.
         a. Every governor knows the leading lawyers of the state better than the whole mass of the people do, and is better able to judge of their fitness for judicial service.
         b. The governor has the facilities for obtaining knowledge concerning the men who seek judgeships.
         c. Every governor will appoint to the judiciary only able and honest men, for he is anxious to have his administration go down into history favorably and creditably.
      2. It will eliminate politics from the bench.
         a. Judges will be able to take office free from any obligations to party bosses or powerful interests.
         b. They will not have to fear antagon-

ism when they seek re-election because of any unpopular decision they have rendered.

c. They will not have to curry favor of the people while serving on the bench.

B. Any evils that may exist in the appointive judiciary are not due to appointment, but to some other cause.

1. The low salaries paid to judges keeps many of the ablest lawyers from accepting judicial appointments.
2. The large incomes possible to the ablest lawyers in private practice prevents many from accepting judgeships.

III. Appointment is a practicable method of selecting the members of the judiciary.

A. It has been used the world over since the beginning of the judiciary system.

1. It is used in every country in the world.
   a. It has always been the system used in Great Britain, where the common law grew up and developed.
   b. It is the plan used in Canada, where the general conditions are much the same as they are in this country but where there is not one-tenth the crime we have in this country.
2. It is the system that has always been used in our Federal courts.
   a. The Constitution specifies that the judges of the Supreme Court shall be appointed by the President with the advice and consent of the Senate.
   b. Congress has provided that all other Federal judges shall be appointed in the same way.

3. It is the system used in the state courts of seven of our states.
   a. It has always been used in Massachusetts whose judicial decisions all authorities consider the best of any state in the union.
   b. It is the plan used in New Jersey that has made "Jersey Justice" a bye-word among the legal profession of the whole country.
   c. The judiciary of these seven states has been highly praised and commended by James Bryce.

B. It has worked well wherever it has been tried.
   1. It has everywhere brought very able lawyers to the bench.
      a. They are much more learned in the law, more dignified, more fair and independent, than the elected judges are.
      b. They are men of more experience.
   2. It keeps good men in office.
      a. By this means it maintains a trained judiciary.
   3. Its results have been universally satisfactory.
      a. It is favored and endorsed by almost all of the lawyers in the world.
      b. There is nowhere any serious agitation for its abandonment and the adoption of the elective system.
   4. It has been endorsed and approved by the best minds in the fields of political and social science.
      a. James Bryce has strongly endorsed it.
      b. Charles W. Eliot has done likewise.

c. Thousands of others, men of the keenest minds and the highest standing, have taken the same position.

NEGATIVE

I. The selection of the judges in this country by executive appointment has been a failure.
   A. It has produced and developed serious evils.
      1. It does not bring the ablest men to the bench.
         a. One might expect the United States Supreme Court to be made up of the nine ablest lawyers in America, but this has never been the case, and at the present time, of the one hundred ablest lawyers in this country not more than one is a member of this court.
         b. In one hundred and forty years of our history there has been only one great chief justice, while in that time we have had five or six great Presidents chosen by the people.
      2. There is secret and sinister politics in the selection of judges by executive appointment.
         a. Appointed judges are practically always of the same political party as the executive making the appointment.
         b. Appointments are generally made purely for political reasons.
            (1) The appointees are usually men who have taken an active part in politics and are endorsed and recommended by party organizations or political bosses.

(2) Federal judges are usually named by the President upon the recommendation of Senators, who use the appointments to reward their political friends.

c. Even the highest judicial positions in the country are usually filled by political appointments.

(1) Roger B. Taney was appointed Chief Justice of the United State Supreme Court by the President who started the spoils system simply and solely as a political reward.

(2) The selection of William H. Taft was purely a political appointment; a choice Woodrow Wilson or Theodore Roosevelt never would have made.

d. Executive appointments are always largely influenced by the invisible government.

(1) The Federal judiciary is filled with men who were formerly corporation lawyers and who, like other fallible human beings, are unable to forget their first love.

3. Politics is not eliminated from the conduct or the decisions of the appointive judiciary.

a. John Marshall took the Federalist view of the issues and political controversies of his day, and rendered his decisions accordingly.

(1) His decision in the case involving the constitutionality of the Bank of the United States is an

example. (*See* Green Bag. 12: 621.)

(2) All his decisions in cases concerning the constitutionality of internal improvements are examples.

b. Under Taney the Supreme Court reversed its attitude, after the majority of the judges were Democrats, and took the opposite view in all cases that came before it involving the political questions of the period.

c. After Chase became the Chief Justice and the majority of the judges were Republicans, the court again reversed its attitude and took the opposite view.

d. Even in deciding the most important matters the United States Supreme Court has often divided on strict party lines.

(1) This was true in the Dred Scott case. (Scott v Sandford. 19 Howard 393.)

(2) The five justices of the Supreme Court who served on the Electoral Commission of 1877 always voted on strict party lines, the majority of them to put into the White House the candidate whom the people had defeated in the election.

(3) In the Legal Tender Cases the Supreme Court reversed itself by a divided decision on party lines, there having been a partial change in the personnel of

the court. (Juilliard v Greenman. 110 United States 421.)

4. Appointed judges often thwart the will of the people and destroy the benefits of free government.
   a. There is much more delay in securing justice in the appointed Federal courts than there is in the elective state courts.
      (1) The prolonged delay in trying the criminal cases that arose out of the Teapot Dome scandal is a monument to the independence and the inefficiency of an appointed judiciary.
   b. Appointed judges are usually aristocratic, loftly, tyrannical, and domineering.
      (1) This type of judge is out of harmony with the other branches of our government, out of place in any free government.
   c. Important laws are often vetoed and sometimes without adequate reason.
      (1) The noblest efforts to advance social reform or secure industrial justice are often thwarted by the judicical veto of the corporation lawyers who have been appointed to the Federal judiciary. (*See* Social Progress: A Handbook of the Liberal Movement. p. 82-90.)
   d. Even the Constitution has been tampered with and altered under the

guise of interpreting and construing it.

(1) For example: The words "from whatever source derived" have been stricken out of the sixteenth amendment by judicial action alone. (240 U.S. 1, 240 U.S. 103, 247 U.S. 165, 252 U.S. 189, and 253 U.S. 245.)

e. Even handed justice and the equal protection of the laws has been denied to the poor.

(1) Elihu Root has said, "In such a game as litigation the poor stand little chance against the rich." (*See* Social Progress. p. 147-52.)

5. The people lack confidence in the courts whose judges are appointed to office.

a. For fifty years this has been the attitude of organized labor.

b. Lincoln, Bryan, Roosevelt, and La-Follete were outspoken in their criticisms of the tyranny and discrimination practiced by the appointive judiciary.

B. These evils are due to the appointive system of selecting judges.

1. Every chief executive, state and national, is under many deep political obligations to those who have aided him to gain his office, and he must pay these political debts by political patronage of which judgeships are a part.

a. Party bosses, political leaders, political organizations, and newspapers who

have supported him must each have their share of the spoils.

b. Great corporations and rich men who have contributed money to the campaign funds must not be offended by appointing the "wrong kind" of men to the Federal judiciary.

2. Many men have been appointed to the United States Supreme Court who have had no previous judicial experience.

a. If such appointments were made on the basis of merit and fitness alone, they would always go to the ablest of the judges of the lower Federal courts and be in the nature of promotion.

II. Popular election is a wise and desirable method of choosing judges in this country.

A. It will remedy the evils produced by the appointive system.

1. It will make the judges responsible to all the people.

a. In a free government it is better that all the officials should be responsible to all the people than that they should be responsible to a few or to a class of the people.

b. This is particularly true of the courts in a country where the courts exercise legislative powers, as they do in this country.

c. It will restore the confidence of the people in their courts.

2. It will bring the selection of the judges out into the open.

a. This will minimize the power of sinis-

ter secret influences that now select the appointive judges.

b. It will greatly reduce the power of the vicious system called the invisible government.

3. It will restrain and prevent haughty, aristocratic, domineering, discriminating, and unjust conduct on the part of the judiciary.

4. It will reduce to a minimum the interference of the judiciary with the will of the people as expressed in the laws enacted by their representatives.

a. The courts, being no longer composed entirely of corporation lawyers who owe their appointments to the power of the invisible government, will not veto all such necessary and desirable laws for social reform as those which prohibited little children from laboring long hours in shops, factories, and mines.

5. It will tend to establish equal and exact justice for all, rich and poor alike.

B. The evils, which it is claimed exist in the elective system, are not caused by the method of popular election, but are due to other and obvious causes.

1. The term of office is often too short to attract the best and ablest men.

2. The salaries paid are too low to make an appeal to the ablest lawyers.

3. The antiquated procedure used in the courts obstructs the administration of justice.

4. Most of the state judges are not permitted by the state laws to comment on the

facts or evidence in a case, or to aid the jury in reaching its conclusion, as is done in all the Federal courts.

5. The veto power over legislation, held by the courts of no other country in the world, but necessary in a dual government with a rigid constitution, gives our courts legislative powers the discharge of which necessarily causes distrust and discontent.

III. Executive appointment is an impracticable method of selecting the judges in this country.

A. No valid conclusion for this country can be drawn from the argument that all of the judges of every other country in the world except Switzerland, and a part of the judges in Switzerland, are selected by appointment.

1. The elective system has never been tried in other countries.
   a. We do not know from actual experience just how much better it would work out.
2. These foreign judges do not have the same powers and duties as our American judges have.
   a. They do not exercise any legislative power to veto laws enacted by the regular law making process.
   b. Too much dignity, independence, fearlessness, vanity, and show are not desirable in a free country whose courts veto, amend, and enact both laws and parts of the constitution.
3. In no foreign country in the world are judges appointed by officials of as low intelligence and integrity as the average governor of an American state.

4. In most of the foreign countries the official who appoints the judges is not himself elected directly by the people.

B. No logical deduction can be drawn from the results in our Federal courts as shownig how the appointive system would work in the states.
   1. The average President in this country has been a very different type of man from what the average governor of our states now is.
   2. Federal judgeships are much higher, more important, more attractive offices than are places in the state judiciary.
   3. The life tenure of the Federal judge makes a strong appeal even to the ablest lawyers.
   4. Higher salaries are paid to the Federal judges than are paid to the state judges.

C. No valid conclusion can be drawn from the results of the appointive system in New England or New Jersey as to how it would work in the western states.
   1. The social and industrial conditions are very different.
   2. The attitude of the people toward their government is very different in the two sections.

D. The appointive system has not worked out successfully in this country.
   1. It has been tried and abandoned in many of our states.
   2. No state that has abandoned it now has any desire to return to it.
   3. In the seven states that still retain the system of executive appointment there has been strong agitation to abandon it.

a. This sentiment was very manifest in the Massachusetts constitutional convention of 1917-1918.

4. There has been agitation to make all Federal judges elective by the people.
   a. This was one of the planks in the LaFollette-Wheeler platform in 1924.
   b. The appointive system for Federal judges is of eighteenth century origin, and has survived simply because the Federal Constitution is so difficult to amend.
5. In those states where the judges are elected by the people but where vacancies are filled by appointment by the governor, we have the only fair and just comparison of the two systems.
   a. Here we see clearly that the appointed judges are distinctly inferior to those elected by the people.

E. Most of the governors of American states are not men to whom any such power should be entrusted.
   1. Most of them are men of mediocre ability and intelligence but clever and cunning politicians.
   2. Quite a number of them have been men of questionable integrity.
      a. Several have been impeached and removed from office within the past twenty-five years, in New York and Texas, for example.
      b. Three or four have been arrested for crimes committed while in office, and one at least is now serving a term in a Federal penitentiary, Kansas, Illinois, and the Indiana as examples.

c. Several of them have been accused of misuse of the public funds on a large scale, Texas and Illinois as examples.
d. Many of them are suspected to have enriched themselves out of the awarding of contracts for highway construction and other public improvements.

3. Not more than three or four of the present governors could possibly be graded as statesmen of the rank of the average President.

F. To give the governors power to appoint all state judges would only increase the existing evils.
1. It would greatly increase the power of the invisible government.
2. It would throw the whole judicial system into the filth of local politics.
3. It would greatly increase the popular distrust and suspicion of the courts and contempt for law.

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GENERAL DISCUSSION

METHODS OF SELECTING JUDGES[1]

In nearly all the state courts it is the practice to select judges in one of two ways, by election or by appointment. Election is the method used in the great majority of the states, that is to say, by thirty-eight states in all. Of the remaining ten states, six leave the selection of their judges, so far as the higher courts are concerned, to the governor. They provide, however, various requirements as to the confirmation of those whom the governor may appoint. In four states the judges of the higher courts are chosen by the legislature.

The term for which judges are chosen varies from life to a few years. In Massachusetts, for example, judges of all courts, whether higher or lower, are appointed by the governor with the consent of his council and hold office until they die or resign. In Pennsylvania the judges of the Supreme Court are elected by the people for twenty-one years, in New York for fourteen years, and in Illinois for six years. In Vermont they are chosen by the legislature for two years only. Many states make a distinction between the judges of the higher and the lower courts, giving the former longer terms.

Much may be said for and against the practice of choosing judges by popular election. Before the Revolution the judges were appointed by the crown through the governor in all the colonies except Rhode Island and Connecticut, where they were chosen by the assembly. The early state constitutions for the most part followed

[1] By William B. Munro. *The Government of the United States.* p. 493-6.

this latter precedent and intrusted to the legislature the function of choosing the judges, although in some cases it was left with the governor. In only one of the original thirteen states, Georgia, were judges chosen by popular vote. This elective method made no considerable progress for many years after the union was established, but the Jacksonian democracy gave it great impetus and it thereafter continued to spread, particularly through the new states of the west. Today there are no appointive judges west of the Alleghanies except in the single state of Mississippi. In only five states outside New England are the judges of the state Supreme Court chosen otherwise than by popular election.

The reasons which dictated resort to popular election of judges were both sentimental and practical. The fixed notion that no branch of the government should exist outside the realm of direct popular control is one which must always be reckoned with in ultra-democratic communities. People are apt to reason that they should directly control not only the making and administration of their own laws but the interpretation of these laws as well. The tide of popular opinion set strongly in that direction during the middle period of American constitutional history and has continued without greatly diminished force down to the present day.

More practical reasons for the change from appointive to elective judges were to be found in the partisanship and chicanery which too often marked the selection of judges by legislatures in the early part of the nineteenth century. By dint of political manipulation and appeals to party allegiance men of doubtful integrity were frequently elevated to judicial positions. Hence the demand for popular election of judges was in part a protest against the way in which legislatures were abusing their trust, just as in latter days and for much the same reasons public opinion insisted upon the popular election of United States senators in place of their appointment by state legislatures.

Nor does the plan of letting the governor choose the judges prove to be free from serious objection. Judical appointments made under that plan often go as the reward of party service to men who are not properly qualified. Appointment by governors has not, on the whole, worked out so unsatisfactorily as selection by legislatures, but it does not today commend itself to many of the states. Popular election has obtained the upper hand.

But in actual operation, as experience proves, the people do not really choose their judges. How, indeed, can a body of a hundred thousand voters obtain the knowledge necessary to insure the placing of legal knowledge, sound judgment, and integrity on the bench? The answer is, that the people do not have such knowledge and do not presume to have it. In many states there is a tradition that a judge, when once elected, shall be retained in office so long as his conduct is at all satisfactory. This means, then, that vacancies on the bench occur, for the most part, only when a judge dies or resigns. When vacancies come in this way, the governor is usually given the right to make an appointment until the next election, and this appointee is likely at that time to be a candidate with the chances much in his favor. Many elective judges, therefore, really owe their election to a governor's temporary appointment.

If it happens, on the other hand, that a judge retires upon the expiry of his elective term, the choice among aspirants for his place is almost invariably made, in the first instance, either by prominent lawyers of the state or by the political leaders. The voters merely choose as between rival candidates thus presented to them. Whichever way they decide they merely approve one or other of the preliminary selections made by the leading lawyers or politicians. Other candidates, supported neither by the bar associations nor by political parties, have ordinarily no chance of being elected. Under the system of nominations by convention the political leaders did their work openly and with a certain sense of responsibility;

under the plan of nomination by direct primaries they merely do it less openly and without responsibility.

Wherever judges are chosen by popular election there is almost always a *de facto* appointing power. Whether the system of election works out well or otherwise depends upon where this *de facto* power resides and how wisely it is used. There is no great difference in the quality of judges obtained in Massachusetts by governor's appointment and in Wisconsin by popular election. This is because the lawyers, through their bar associations, have a considerable influence in both. The system of elective judges works best where the legal fraternity has the greatest practical weight in making the preliminary selections; it works badly where the nominations are dictated by the political leaders.

METHODS OF ELECTION OF JUDGES OF THE VARIOUS STATES [1]

I desire to call attention to the selection of judges of state and county courts in the various states of the union prepared at my suggestion in the Legislative Reference Division of the Library of Congress.

From this statement it is seen that of the forty-eight states in the union thirty-six of these states elect all their judges by the people. In these states no judges are appointed and none are selected by the legislatures, but the people themselves decide who shall preside over their courts. The judges are amenable to the public for their bearing and their conduct. If a judge has been a worthy judge he is usually reelected, but if not the people select another. Of the remaining twelve states there are five states where the people in part elect the judges of the courts. There are seven states in which people have no voice in the selection of their judges.

[1] By C. Bascom Slemp. *Congressional Record.* (Appendix). 54: 698-700. March 2, 1917.

METHOD OF SELECTION OF JUDGES OF STATE AND COUNTY COURTS.

ALABAMA

Supreme court elected by the people (Const., VI, 152).
Circuit courts elected by the people (Const., VI, 152).
Probate courts elected by the people (Const., VI, 152).
Courts of chancery elected by the people (Const., VI, 152).
Inferior courts of law or equity elected or appointed (Const., VI, 153).
The county courts are precided over by the probate judges of the respective counties (Crim. Code, sec. 6696).

ARIZONA

Supreme court elected by the people (Const., VI, 3).
Superior county courts elected by the people. (Const., VI, 5).

ARKANSAS

Supreme court elected by the people (Const., VII, 6).
Circuit courts elected by the people (Const., VII, 7)
County courts elected by the people (Const., VII, 29).

CALIFORNIA

Supreme court elected by the people (Const., VI, 3).
District courts of appeals elected by the people (Const., VI, 4).
Superior courts elected by the people (Const, VI, 6).

COLORADO

Supreme court elected by the people (Const., VI, 6).
District courts elected by the people (Const., VI, 12).
County courts elected by the people (Const., VI, 22).

CONNECTICUT

Supreme court of errors selected by the legislature (Const., V, 3; Amend. XXVI).
Superior court selected by the legislature (Const., V, 3; Amend. XXVI).
Court of common pleas selected by the legislature (Gen. Stat., 1902, sec. 57).
Probate courts elected by the people (Const., Amend. XXI).

DELAWARE

Supreme court appointed by governor (Const., IV, 2, 3).
Superior court appointed by governor (Const., IV, 2, 5).
Court of chancery appointed by governor (Const., IV, 2, 3).
Orphans' court appointed by governor (Const., IV, 3, 11).
Court of oyer and terminer appointed by governor (Const., IV, 3, 5).
Court of general sessions appointed by governor (Const., IV, 3, 5).

Florida

Supreme court elected by the people (Const., V. 2).
Circuit courts appointed by governor (Const., V. 8).
County criminal courts appointed by governor (Const., V. 24).
"County judge" elected by the people (Const., V. 16).

Georgia

Supreme court elected by the people (Const., VI, 2, 8).
Court of appeals elected by the people (Const., VI, 2, 9).
Superior courts elected by the people (Const., VI, 3, 2).
Courts of ordinary elected by the people (Const., VI, 6, 3).

Idaho

Supreme court elected by the people (Const., V. 6).
District courts elected by the people (Const., V. 11).
Probate courts elected by the people (Const., XVIII, 6).

Illinois

Supreme court elected by the people (Const., VI, 6).
Appellate courts elected by the people (Const., VI, 11, 13).
Circuit courts elected by the people (Const., VI, 13).
County courts elected by the people (Const., VI, 18).
Probate courts elected by the people (Const., VI, 20).

Indiana

Supreme court elected by the people (Const., VII, 3).
Appellate court elected by the people (Burns' Ann. Stat., 1914, sec. 1398).
Circuit courts elected by the people (Const., VII, 9).
County superior courts elected by the people (Burns' Ann Stat., 1914. sec. 1462).
County criminal courts elected by the people (Burns' Ann Stat., 1914, sec. 1597).
Probate courts elected by the people (Burns' Ann Stat., 1914, sec. 1608).

Iowa

Supreme court elected by the people (Const., V, 3, 11).
District courts elected by the people (Const., V, 5, 11).

Kansas

Supreme court elected by the people (Const., III, 171).
District courts elected by the people (Const., III, 174).
Probate courts elected by the people (Const., III, 177).

Kentucky

Court of appeals elected by the people (Const., IV, 3).
Circuit courts elected by the people (Const., IV, 20).
County courts elected by the people (Const., IV, 30).

Louisiana

Supreme court elected by the people (Const., 86).
Courts of appeal elected by the people (Const., 99, 100).
District courts elected by the people (Const., 109).

Maine

Supreme judicial court appointed by governor (Const., V, Pt. 1, 8).
Probate courts elected by the people (Const., VI, 7).

Maryland

Court of appeals elected by the people (Const., IV, 3).
Circuit courts elected by the people (Const., IV, 3).
Orphans' courts elected by the people (Const., IV, 3).

Massachusetts

Supreme judicial court appointed by governor (Const., Pt. II, Ch. II, sec. 1 (9).) (Rev. Laws, 1902, p. 1373).
Superior court appointed by governor (Const., Pt. II, Ch. II, sec. I (9).) (Rev. Laws, 1902, p. 1378).
Probate courts, appointed by governor (Const., Pt. II, Ch. II, sec. I (9).) (Rev. Laws, 1902 p. 1423).
"Trial justices" appointed by governor. (Rev. Laws, 1902, p. 1414).

Michigan

Supreme court elected by the people (Const., VII, 2).
Circuit courts elected by the people (Const., VII, 8).
Probate courts elected by the people (Const., VII, 14).

Minnesota

Supreme court elected by the people (Const., VI, 3).
District courts elected by the people (Const., VI, 4).
Probate courts elected by the people (Const., VI, 7).

Mississippi

Supreme court appointed by governor (Const., VI, 145).
Circuit courts appointed by governor (Const., VI, 153).
Courts of chancery appointed by governor (Const., VI, 153).

Missouri

Supreme court elected by the people (Const., VI, 8.)
Circuit courts elected by the people (Const., VI, 25).
Criminal courts elected by the people (Const., VI, 30).
Probate courts elected by the people (Const., VI, 34).
County courts elected by people (Const., VI, 30).

Montana

Supreme court elected by the people (Const., VIII, 6).
District courts elected by the people (Const., VIII, 12).

Nebraska

Supreme court elected by the people (Const., VI, 4).
District courts elected by the people (Const., VI, 10).
County courts elected by the people (Const., VI, 15).

Nevada

Supreme court elected by the people (Const., VI, 3).
District courts elected by the people (Const., VI, 5)

New Jersey

Supreme court appointed by governor (Const., VII, 2 (1)).
Court of errors and appeals appointed by governor (Const., VII, 2 (1)).
Court of chancery appointed by governor (Const., VII, 2 (1)).
Circuit courts appointed by governor (Const., VI, 5 (2), VII, 2 (1)).
Prerogative court appointed by governor (Const., VI, 4 (2), VII, 2 (1)).
Court of common pleas appointed by legislature (Const, VII, 2 (2)).

New Hampshire

Supreme court appointed by governor (Const., II, 45, Chase's Pub. Stat., Supp. 1913, p. 486).
Superior court appointed by governor (Const., 11, 45, Chase's Pub. Stat., Supp. 1913, p. 486).
Probate courts appointed by governor (Const., 11, 45, 79).

New Mexico

Supreme court elected by the people (Const., VI, 4).
District courts elected by the people (Const., VI, 12).
Probate courts elected by the people (Stat., 1915, sec. 1245).

New York

Supreme court elected by the people (Const., VI, 1).
Court of appeals elected by the people (Const., VI, 7).
Surrogates' courts elected by the people (Const., VI, 15).
County courts elected by the people (Const., VI, 14).

North Carolina

Supreme court elected by the people (Const., IV, 20).
Superior courts elected by the people (Const., IV, 20).

North Dakota

Supreme court elected by the people (Const., IV, 90).
District courts elected by the people (Const., IV. 104).
County courts elected by the people (Const., IV, 110).

Ohio

Supreme court elected by the people (Const., IV, 2).
Court of appeals elected by the people (Const., IV, 6).
Court of common pleas elected by the people (Const., IV, 3).
Probate courts elected by the people (Const., IV, 7).

Oklahoma

Supreme court elected by the people (Const., VII, 3).
District courts elected by the people (Const., VII, 9).
County courts elected by the people (Const., VII, 11).

Oregon

Supreme court elected by the people (Const., VII, 1).
Circuit courts elected by the people (Const. VII, 1, 8).
County courts elected by the people (Const., VII, 11).

Pennsylvania

Supreme court elected by the people (Const., V, 2).
Courts of common pleas elected by the people (Const., V, 1, 15).
Courts of oyer and terminer and general jail delivery elected by the people (Const., V, 1, 15).
Courts of quarter sessions of the peace elected by the people (Const., V, 1, 15).
Orphans' courts elected by the people (Const., V, 1, 15).

Rhode Island

Supreme court selected by legislature (Const., X, 4).
Superior court selected by legislature (Gen. Laws, 1909, p. 949).
District courts selected by legislature (Gen. Laws, 1909, p. 973).

South Carolina

Supreme court selected by legislature (Const., V, 2).
Court of common pleas selected by legislature (Const. V, 1, 13).
Court of general sessions selected by legislature (Const., V, 1, 13).
County courts elected by the people (Civil Code, 1912, sec. 3856).
Probate courts elected by the people (Civil Code, 1912, secs. 280, 1360).

South Dakota

Supreme court elected by the people (Const., V, 5).
Circuit courts elected by the people (Const., V, 15).
County courts elected by the people (Const., V, 19).

Tennessee

Supreme court elected by the people (Const., VI, 3).
Courts of chancery elected by the people. (Shannon's Ann. Code, 1917, sec. 374).
Circuit courts elected by the people. (Shannon's Ann. Code, 1917, sec. 374).
County courts elected by the people (Shannon's Ann. Code, 1917, sec. 385).

Texas

Supreme court elected by the people (Const., V, 2).
Courts of civil appeals elected by the people (Const., V, 6).
Courts of criminal appeals elected by the people (Const., V, 4).
District courts elected by the people (Const., V, 7).
County courts elected by the people (Const., V, 15).

Utah

Supreme court elected by the people (Const., VIII, 2).
District courts elected by the people (Const., VIII, 5).

Vermont

Supreme court selected by the legislature (Const., II, 42).
Courts of chancery selected by the legislature (Pub. Stat., 1906, sec. 1231, 1234, 1342).
County courts selected by the legislature (Const., II, 42).
Probate courts elected by the people (Const., II, 35).
Courts of insolvency by the people (Pub. Stat., 1906, sec. 2412; Const., II, 35).
Court of claims selected by the legislature (Pub. Stat., 1906, sec. 465).

Virginia

Supreme court of appeals selected by the legislature (Const., VI, 91).
Circuit courts selected by the legislature (Const., VI, 96).
Corporation courts selected by the legislature (Const., VI, 96).
Law and chancery courts selected by the legislature (Const., VI, 96).

Washington

Supreme court elected by the people (Const., IV, 3).
Superior courts elected by the people (Const., IV, 5).

West Virginia

Supreme court of appeals elected by the people (Const., VIII, 2).
Circuit courts elected by the people (Const., VIII, 10).
County courts elected by the people (Const., VIII, 23).

WISCONSIN

Supreme court elected by the people (Const., VII, 4).
Circuit courts elected by the people (Const., VII, 10).
Probate courts elected by the people (Const., VII, 14).
County courts elected by the people (Stat., 1915, sec. 2441).

WYOMING

Supreme court elected by the people (Const., V, 4).
District court elected by the people (Const., V, 19).

BRIEF EXCERPTS

In a popular government the most difficult problem is to determine a satisfactory method of selecting the members of its judicial branch.—*William H. Taft. Popular Government. p.* 186-7.

Of all kinds of corruption that of the judiciary is the most odious, being one of the commonest ways in which the rich man gets the better of the poor.—*James Bryce. Modern Democracies. Vol.* 2, *p.* 480.

The chief protection of the few against the many, of the weak against the strong, the main assurance of the perpetuity of our republican institutions lies in a strong, capable, and independent judiciary.—*George B. Harris. Proceedings of the Ohio State Bar Association,* 1923. *p.* 89.

The elective judiciary is a fact, and the exceptions, outside of the federal bench, are so few that we are safe in saying that it is really the American policy to elect at popular elections the occupants of the bench.—*C. S. Cutting. Proceedings of the State Bar Association of Wisconsin,* 1919-1921. *p.* 507.

In this state we have tried the appointing of judges and changed to the method of electing. In many other states the same has occurred. In some states judges

were elected for a time and change was made to the appointive system, but neither the elective system nor the appointive system as it has been heretofore done, is satisfactory.—*Oscar A. Trippet. Proceedings, First Annual Convention California Bar Association,* 1910. *p.* 46.

There is no department or branch of the government of so vital importance to the perpetuity of our republican institutions as the courts of the land. If this government is to endure republican in form; if the blessings of liberty, the rights of property, and the pursuit of happiness are to be vouchsafed to coming generations, it will depend largely upon an able, uncorruptible judiciary that is removed from all influences other than those which ask the questions, what is the law and justice of the case.—*F. D. Mills. Bar Association of Kansas,* 1897. *p.* 47.

From the outset the American bench, because it deals with the most fiercely contested of political issues, has been an instrument necessary to political success. Consequently political parties have striven to control it, and therefore the bench has always had an avowed partisan bias. This avowed political or social bias has, I infer, bred among the American people the conviction that justice is not administered indifferently to all men, wherefore the bench is not respected with us as, for instance, it is in Great Britain, where law and politics are sundered.—*Brooks Adams. The Theory of Social Revolutions. p.* 47-8.

The trend of Marshall's views of the federal constitution and its relation to state governments and the proper construction of that instrument in reference to the political questions which harassed the country during the first half of the century, could no more have been changed by argument of counsel in special causes than could those of Taney who succeeded him; and the

opinions of the one great judge, as well as the other, became, in a great measure and of course, the enunciation of party tenents. A more striking instance of the inability of even great minds to disassociate their judicial or quasi-judicial action from partisan demands is seen in the Tilden-Hayes Electoral Commission. This kind of partisanship in our judges cannot be corrected by any method either of appointment or election. It has root in the organization of human nature and must be endured.—*Frank H. Graves. Proceedings of the Washington State Bar Association,* 1894. *p.* 86-7.

Our [Ohio] last legislature adopted the so-called non-partisan judicial ballot, the purpose being to remove the bench not only from politics, but from those other selfish, subtle, and dangerous influences that have crept into the judicial service. The more observing and intelligent element in this community know that that law has failed of its purposes. In the last campaign for the election of judges for all the higher courts in the state, it is a well-known fact that partisan politics took a hand quite as effectively as it ever did under the old system. Party organizations unfurled the banner of their own nominees in utter defiance of the spirit and purpose of the statute, with the result that the dominant organization, as a rule, came off a glorious victor. Instead of having an independent judiciary, as the people in all good faith intended, we shall have a judiciary dominated more or less by party organization and certain allied newspaper interests in plain and open violation of our so-called Corrupt Practice Act. There can be no such thing as an independent judiciary so long as we have the short [term] elective system for our judges where the whims, prejudices, and conceits of unprincipled, heartless demagogues have selfish interests to serve.—*Judge Harvey R. Keeler. Green Bag.* 25:147. *March,* 1913.

AFFIRMATIVE DISCUSSION

THE STATE JUDGES[1]

The state judges of every grade are elected by the citizens, except in seven states in which they are appointed by the governor (with the approval of the council or of the legislature), and in four in which they are elected by the legislature. Where the people elect, either by a state vote or in local areas by a local vote, the candidates are nominated by the political parties, like other elective officials, and usually stand on the same ticket with those officials as party candidates, though occasionally a non-party judicial ticket is put forward by citizens dissatisfied with the party nominations. Such action, when taken, is apt to proceed from leading members of the local bar. It seldom succeeds, and as a rule the best chance of securing good candidates is through the influence of the bar upon those who control the party nominations.

The tenure of judicial office varies greatly. In two of the seven states where the governor appoints, the judge sits for life, *i.e.*, is removable only by impeachment or upon an address of both houses of the legislature. In one of those where the legislature elects this is also the practice. In the remaining forty he is either elected or appointed for a term which varies from two years[2] to twenty-one, eight or ten years being the average. Re-elections are frequent if the judge has satisfied the bar of his competence and honor.

The salaries vary in proportion to the population and wealth of the state, $6,000 (about £1,200) being the

[1] By James Bryce. *Modern Democracies.* Vol. 2, p. 85-93.
[2] In Vermont.

average. Only in one state (New York), and only to some of its judges, is a salary so large as $17,500 (£3,500) paid,[1] even this sum being less than one-fifth of what some lawyers make by private practice.

No one will be surprised at what is, in most states, the combined effect on the quality of the bench of these three factors—low salaries, short terms, and election by a popular vote controlled by party managers. The ablest lawyers seldom offer themselves: the men elected owe their election and look for their re-election to persons most of whom neither possess nor deserve the confidence of the better citizens.

We must, however, discriminate between different sets of states, for the differences are marked. Three classes may be roughly distinguished.

In some six or seven states, including those in which the governor appoints, the judges of the highest court, and as a rule the judges of the second rank also, are competent lawyers and upright men. Some would do credit to any court in any country.

In most of the other states (a majority of the total number) the justices of the highest court are tolerably competent, even if inferior in learning and acumen to the ablest of the counsel who practise before them. Almost all are above suspicion of pecuniary corruption, though some are liable to be swayed by personal or political influences, for the judge cannot forget his re-election, and is tempted to be complaisant to those who can affect it. In these states the justices of the lower courts are of only mediocre capacity, but hardly ever venal.

Of the few remaining states it is hard to speak positively. A general description must needs be vague, because the only persons who have full opportunity for gauging the talents and honesty of the judges are the old practitioners in their courts who see them fre-

[1] In England a judge of the High Court receives £5,000, nearly $25,000.

quently and get to "know their ins and outs." These practitioners are not always unbiased, nor always willing to tell what they know. All that can safely be said is that in a certain small number of states the bench as a whole is not trusted. In every court, be it of higher or lower rank, there are some good men, probably more good than bad. But no plaintiff or defendant knows what to expect. If he goes before one of the upright judges his case may be tried as fairly as it would be in Massachusetts or in Middlesex. On the other hand, fate may send him to a court where the rill of legal knowledge runs very thin, or to one where the stream of justice is polluted at its source. The use of the mandatory or prohibitory power of court to issue injunctions, and of the power to commit for some alleged contempt of court, is a fertile source of mischief. Injunctions obtained from a pliable judge are sometimes moves in a stock-gambling or in a political game, especially if the lawsuit has a party color.

Taking the states as a whole, one may say that in most of them the bench does not enjoy that respect which ought to be felt for the ministers of justice, and that in some few states enough is known to justify distrust. In these the judges of lower rank are not necessarily less scrupulous than are those of the highest courts, but their scanty equipment of legal knowledge means that justice is not only uncertain, but also slow and costly, because the weaker the judge the greater the likelihood of delay and appeals, since American practitioners can always find some technical ground for a postponement or for trying to upset a decision.

All these things considered, it is surprising not that the defects described exist, but that they and the results they produce are not even worse. Worse they would be but for the sort of censorship which the bar exercises, making all but the blackest sheep amenable to the public opinion of their state or neighborhood.

How do these defects tell upon the daily administration of justice between man and man? As respects civil cases, seeing that the great majority of cases in contract or tort, or affecting property, come into state courts, one hears fewer complaints than might have been expected. Evils of long standing are taken for granted: people have in many parts of the union ceased to expect strong men except in the Federal courts and those of a few states. Law is a costly luxury, but it is costly in all countries. In America its march is slow, but in many states the rules of procedure are antiquated and absurdly technical, and most of the codes of procedure adopted in some states have been ill-drawn and cumbrous. The intelligence of juries, the learning and ability of the bar (legal education is probably nowhere so thorough as in the United States) help the weak judge over many a stile; while favoritism and corruption, at all times hard to prove, attract little notice unless the case affects some public interest. Nevertheless, even if things are less bad than the causes at work might have made them, clear it is that the incompetence of judges does in many states involve immense waste to litigants through appeals and other delays, and through the uncertainty into which the law is brought by decisions in inferior courts likely to be reversed on appeal.

Though the administration of civil justice leaves much to be desired, that of criminal justice is far worse. There are few states, perhaps only two or three outside New England—New Jersey is one—where it is either prompt or efficient. All through the rest of the country, south and west, trials are of inordinate length, and when the verdict has been given, months or years may elapse before the sentence can be carried into effect. Many offenders escape whom everybody knows to be guilty, and the deterrent effect of punishment is correspondingly reduced. From among the high authorities who have described and deplored this state of things it is sufficient

to quote ex-President William H. Taft, who with exceptional experience, and a judgment universally respected, has pointed to "the lax enforcement of the criminal law" as one of the greatest evils from which the people of the United States suffer.[1]

Many causes have combined to produce this inefficiency. One is the extreme length of trials, especially trials for murder. First of all, there is the difficulty of getting a jury. In some states the jury lists are not fairly made up; but even where they are, the exercise of the right of challenging, on the ground that the person summoned is prejudiced or has already formed an opinion, is carried to extreme lengths. Sometimes hundreds of persons are rejected by one side or the other. There was a state prosecution in California a few years ago in which more than two months were spent in challenges before a jury was at last impanelled. Then there are the numerous intricacies of procedure and the hightly technical rules of evidence. Every possible point is taken and argued on behalf of the prisoner if he has the means of retaining a skilful counsel. Objections taken to the judge's rulings on points of evidence, or to the terms of his charge, are reserved for subsequent argument before the full court; and it is often a year or more before the court deals with them. Distrust of authority and "faith in the people" have led nearly all states to limit strictly the functions of the judge. He may declare the law and sum up the evidence, but is not permitted to advise the jury as to the conclusions they ought to draw from the evidence, and he has generally less power than an English judge enjoys of allowing amendments where a purely technical mistake, not prejudicing the prisoner, has been committed.

Juries themselves are not always above suspicion. There are in many cities lawyers who have a reputation as "jury fixers"; and where unanimity is required by

[1] *Popular Government, Its Essence, Its Permanence, and Its Perils.* 1913.

the law of the state, the process of fixing may be none too difficult.

If a verdict of guilty has been delivered, and if, months or possibly even years afterward, all the legal points taken for the defence have been overruled by the court, the prisoner has still good chances of escape. There is in the United States an almost morbid sympathy for some classes of criminals, a sentiment frequently affecting juries, which goes on increasing when a long period has elapsed since the crime was committed.[1] A conviction for murder, especially if there was any emotional motive present, is usually followed by a torrent of appeals for clemency in the press, while the governor is besieged with letters and petitions demanding a reprieve or commutation of the sentence. Hardly a voice is raised on behalf of the enforcement of the law. Sometimes the matter gets into politics, and a governor's sense of duty may be weakened by those who urge that his leniency will win popular favor.

The sentimental weakness which is indulgent to crime because it pities the individual offender while forgetting the general interests of society is common in democratic peoples, and perhaps even commoner in America than in Italy or France. It now and then appears in Australia. When to all these causes we add the intellectual mediocrity of so many among the state judges, the frequent failures of criminal justice become intelligible; and one wonders not at the practical impunity accorded in many states to violent crime, but at the indifference of the public to so grave an evil. Recently the Bar Association of New York has bestirred itself to secure reforms; but there are states where the conditions are far worse than in New York, and where the frequency of homicide and the feebleness of the law in

[1] Says Mr. Taft (p. 225 of book above referred to): "The lax administration of the criminal law is due in a marked degree to the prevalence of maudlin sentiment among the people and the alluring limelight in which the criminal walks if only he can give a little sensational colouring to his mean or sordid offence."

coping with it rouse little comment. This is especially the case in the southern states where the habits of violence formed in the days of slavery have not died out, and where racial feeling is so strong that it is just as difficult in many districts to secure the punishment of a white who has injured or even killed a negro as it has been to obtain justice in a Turkish court for a Christian against a Muslim. The practice of lynching is the natural concomitant of a tardy or imperfect enforcement of the law. Though not rare in some parts of the west, and sometimes applied to white offenders, it is specially frequent in the southern states, but not confined to them. In 1910, at the little town of Coatesville in Pennsylvania, a negro criminal lying in the town hospital awaiting trial was seized by a mob, dragged out of town, and roasted alive, no one interfering. Several persons were indicted, but all escaped punishment. This is one of the many cases in which there was no excuse for a violent interference with the regular process of law, for the victim would undoubtedly have been found guilty and executed for murder.

It is not solely from the incompetence of state judges and the defects of criminal procedure that public order and the respect for law have been suffering. In some states the executive officials fail to arrest or bring to trial breakers of the peace. In some few, bands of ruffians have been allowed for months or years to perpetrate outrages on persons whose conduct displeased them; and this, in the case of the White Caps in Indiana and the Night Riders in Kentucky, with practical impunity, the legislatures having provided no rural police. Train robberies by brigands resembling the dacoits of India have not quite ceased in parts of the west, though they no longer receive that indulgent admiration of their boldness which made Robin Hood a hero in mediaeval England. On the Pacific coast the Federal government has found it hard to induce the

state authorities to secure to immigrants from eastern Asia the rights which they enjoy by treaty or by a sort of common law of nations. It is urged by way of extenuation, both for the prevalence of lynching and for other failures to enforce the law, that habits of disorder —being a legacy from the days when a wild country was being settled by bold and forceful frontiersmen, and men had to protect themselves by a rude justice— disappear slowly, that the regard for human life is still imperfect, that the custom of carrying pistols is widespread, and that the cost of policing thinly peopled regions is disproportionate to the frequency of the offences committed. Whatever weight may be allowed to these palliations, it remains true that in many parts of the United States facts do not warrant the claim that democratic government creates a law-abiding spirit among the citizens.

Why is there not a stronger sense of the harm done to the community by failures of justice and the consequent disregard of human life? Why does not a public opinion which is in most respects so humane and enlightened as is that of the American people, put forth its strength to stamp out the practice? As respects the defects of criminal procedure in general, it must be remembered, that an evil which has become familiar ceases to be shocking. The standard custom as set comes to be accepted: it is only the stranger who is amazed. Those good citizens in the states referred to who are shocked and desire a reform find it hard to know how or where to begin. The lower sort of lawyers, numerous in the legislatures, dislike reforms which would reduce their facilities for protracting legal proceedings to their own profit, and are apt to resist improvements in procedure. The ordinary legislator has not the knowledge to enable him to prepare or put through bills for the purpose. No body in a state is responsible for pushing reforms forward, for the governor is not rep-

resented in the legislature and the members are often jealous of his intervention. These explanations, the best that are supplied to the enquirer, leave him still surprised at the tolerance extended to the enemies of public peace and order.[1]

Some one may ask, "Since the inferiority of the state judges is a palpable and evident source of weakness, and one which could be removed by improving their position, why is that not done? Why not give better salaries with longer terms and drop popular election? Cheap justice may be dear in the long run."

The answer to this question casts still further light on certain features of democratic government.

When the thirteen original states separated from England all of them left the appointment of judges in the hands of the state governor, except two, where the legislature, and one, Georgia, where the people chose them. The system of appointments worked well: the judges were upright and respected, and it might have been expected that when new states made constitutions for themseves they would have followed the lead given by their predecessors. But between 1830 and 1850 a wave of democratic sentiment swept over the nation. The people, more than ever possessed or obsessed by the doctrine of popular sovereignty, came to think that they must be not only the ultimate sources but the direct wielders of power. The subjection of all authority to theirs was to be expressed in the popular choice of every official for a term of office so short that he must never forget his masters, and with a salary too small to permit him to fancy himself better than his neighbors. The view has persisted, and still governs men's minds in

[1] The growing demand for judicial reforms in the states recently led to the formation of a body called the American Judicature Society, supported by many leading judges, lawyers, and professors of law. It advocates a simplification of legal procedure, longer tenure and better salaries for judges, and some method of selection more satisfactory than popular election has proved to be. Progress has been made in improving the municipal court systems, and it is believed that public opinion on the subject is being by degrees educated.

most states. It is not argued that the plan secures good judges. Obedience to a so-called principle disregards or ignores that aspect of the matter. Being in Kentucky in 1890, attending a state convention called to draft a new constitution, I enquired whether no one would propose to restore the old method of appointment by the governor, and was told that no such proposal would be listened to. It would be undemocratic. In California in 1909 when, after hearing severe comments upon most of the judges, I asked whether the citizens could not be induced to secure better men by larger salaries and longer terms, the answer was that the only change the citizens would make would be to shorten terms and reduce salaries still further in order to prevent the judges from feeling class sympathy with the rich and the business corporations. Whether appointment by the executive would work as well in western and southern states, or for the matter of that in New York and Pennsylvania as it works in Massachusetts and New Jersey it would be hard to say, for in the last-named states a tradition exists which the governor is obliged to live up to; whereas in states where the elective system has set a lower standard a governor might prostitute his patronage. But it is an indefensible system.

THE VICIOUS CIRCLE[1]

Much of the injurious prolongation of testimony, cross-examination, and argument in the American courts is due to the fact that the judges have been deprived of effective control over counsel. It is an important function of a good judge to abbreviate testimony by excluding the irrevelant and to limit cross-examination and argument. To this end judges should be independent and well paid, appointed to serve during good behavior and efficiency, and entitled to a pension after reasonably

[1] By Charles W. Eliot, President Emeritus of Harvard University. *Third Annual Report of the Massachusetts Bar Association*, 1913. p. 40-1.

long service, or on disability. The judge should always be the principal person in the court room. He is in England; often he is not in this country. The American practice of electing judges for short terms has seriously impaired in many states the quality of judges and their position in the community. The very voters that elect the judges easily acquire a habit of distrusting them.

This serious change in the position and function of the judges has been accompanied by a change in the habits of eminent legal practitioners which also tends to the lowering of courts and judicial procedure in the public estimation. It has been noticeable of late years that leading lawyers are not much in court rooms. They work in private chambers for rich men and rich corporations, drawing legal papers for promoters, industrial adventurers, and bankers. In this service higher fees can be charged than in service before the courts. It is commonly the junior members of large legal firms who argue cases in court. The passing of the judge, the disappearance of great court-room advocates, the popular distrust of courts, and the disposition of rich business men and corporations to avoid litigation and "beat the law" so far as they safely can, and even farther, have constituted a vicious circle of evil tendencies in both theory and practice, the effects of which on public opinion in the United States have been plain, widespread, and deeply to be deplored.

The election of judges for short terms accounts for many of these evils. Several states, notably the state of Michigan, have had for a time good elective judiciaries; but the electors do not consistently maintain the highest standards of selection, and not infrequently fail to re-elect the most admirable judges. Indeed, such a tenure of judicial office disregards some of the most obvious of human qualities. The judge who desires reelection cannot help considering what effect his conduct in the court room and his published decisions will have

on his re-election. As an elected judge grows older and therefore less able to resume practice, he invariably becomes more timorous and less independent, particularly as he cannot look forward to any pension when he fails to be re-elected. It is perfectly plain that in the long run an elective judiciary cannot command the popular respect which an appointive judiciary commands; and the fact that the great majority of American judges are elected accounts for the dissatisfaction of the public with American judicial procedure.

METHODS OF SELECTING JUDGES[1]

Now, let us consider the arguments for and against some of the methods by which our American democracies might *select* their judges in the first instance.

1. *Popular election of Judges—the prevailing method in the United States.* The objections here are patent. Obviously a satisfactory selection for any office can be made only when the selecting power can acquire some fair knowledge of the fitness of individual candidates for the office. Where the selecting power is the electorate at large such knowledge is difficult to acquire in proportion as the numbers of the electorate increase. Where offices are essentially political and their incumbents are charged with the duty of framing or of executing some one or more of competing policies, then the selective function of the electorate is performed under the most favorable circumstances—particularly if the offices to be filled are somewhat conspicuous and not too numerous. But in proportion as the requirements for office become technical, or the offices numerous, does the electorate become an inefficient instrument of selection. Now the principal qualities needed in a judge are personal in-

[1] By James Parker Hall, Dean of the University of Chicago Law School. Part of an address delivered before the Ohio State Bar Association on December 29, 1915, and published in the 1916 *Proceedings of the Association.* Vol. 37, p. 144-54.

tegrity, adequate legal training, and a judicial temperament. The second of these is wholly technical and little reliable information about it is likely to be found outside of the members of the bar themselves. The other needed qualities can be ascertained by personal acquaintance, but very few lawyers of the sort that would make desirable judges have been able to make themselves known, either personally or by reputation, to more than a minute fraction of the electorate in any of our good sized cities or in the judicial districts that fill important judgeships. It is almost impossible for a lawyer to obtain a popular following of any size without a large expenditure of time and effort in ways altogether likely to make him less fitted for judicial office than if he faithfully devoted himself to his profession. Candidates for legislative and executive offices may have policies which they may advocate and with which they may so identify themselves that, though little be known about them personally, a vote for them may be considered as a vote for their policies; but a candidate for a judgeship can have no policy of any importance as compared with his ability to administer the law honestly and competently, and of this ability his open claims are poor evidence and worse taste. This is not to say that judges do not occasionally decide important questions largely upon grounds of general policy. The highest court of a state may thus decide a constitutional question now and then, but such decisions, if really counter to any serious social movement, cannot long delay it, and do little injury as compared with that wrought by a long series of vacillating or unsound decisions between private litigants in cases not involving spectacular matters of public interest; or with the spectacle of a candidate for judicial office conducting a campaign by pledging himself in advance to decide certain cases according to a certain view of policy.

Indeed, the obstacles in the way of any real public choice of judges by a numerous electorate are so great

that, in fact, what almost invariably happens is that new candidates for judgeships are selected by the party leaders with little or no regard for the possibilities of any public preference in regard to these offices; and when a number of judges must be chosen at once, as often happens in the large cities, the helplessness of the electorate is still greater. Bad as the choice of the party leaders sometimes was, there was at any rate a *possibility* of intelligent choice, for the leaders *could* inform themselves about potential candidates if they chose to do so. It has been left for the direct primary, coupled with the non-partisan judicial ballot, to show just how blind the unguided electorate is in choosing judges. In the few states that have recently tried this only chaos has resulted. Any lawyer being free to place his name in the nominating ballot by petition, large numbers have done so; and, nearly all of them being but little known, a most disgusting campaign of personal advertising for the nomination has in many places ensued, followed to a great extent by the same kind of a campaign for the election. Under the system of party nominations, a nominated candidate was fairly certain of his party vote if only his name was under the partly emblem, no matter how unknown he might be to the mass of the voters; but, on the non-partisan judicial ballot, this distinquishing mark being denied him, he has felt the necessity of doing something to attract attention personally, and what he has done has in many cases reflected sadly upon the weakness of human nature when it runs for office. Even sitting judges who are candidates for re-nomination or re-election have yielded to the same pressure, with the results thus described by one of the ablest and most upright lawyers in California in a report made to the Commonwealth Club, the leading reform organization of San Francisco:

In California the judge is nominated by petition and must submit to two elections, one in September and one in November.

As his functions prohibit his having any political policy, he can not have the assistance of any of the regular political organizations. He must in some way lift his personality out of the mass of citizens so that the voters will at least know he is a candidate. The two most successful methods are joining and participating in the great fraternal social organizations and entertainments, and the use of the newspapers to exploit the spectacular and yellow incidents of trials pending before him. It is safe to say that the nine or ten months preceding the election of judges show a diminishing in the efficiency of the candidate for re-election of not less than fifty per cent. Nothing is more conducive to disgust with our institutions than to hear of a judge, who in the morning tells you of the corruption and venality in certain branches of the police service, that he spent the evening at the Policemen's Ball, smiling genially in the faces of the particular officers whose evil conduct he has depicted, shaking them by the hand and lending to them the apparent prestige and moral support of his high office. We have all heard of the judge who helped his way to the bench with the singing of questionable ditties at after-dinner frolics of great fraternal organizations; of the judge who kept the sympathy of the underworld by drinking, carousing and dicing in public places; of the judge who spent more of the afternoon hours at the race tracks and in the drinking cafes than on the bench; of the judge who emerges from his chambers into the courtroom, surrounded by the reporters, for whom he will so shape up a case involving a salacious or meretricious incident in some unhappy family, that it will have a high news value.

These are but the more obviously distressing incidents. But equally impairing to the efficiency of the bench is the loss of time and energy by the self-respecting and capable judge who knows, for it is a fact, that he must court publicity or he will be retired by some shrewder and less scrupulous campaigner or some opponent more fortunate in capturing a momentary popularity near election day. The longer the conscientious man is on the bench, and hence the more valuable he is as a public servant, the more keenly do we expose him to this anxiety regarding his re-election. Defeat means a return to the bar without a brief, his clients attached to other attorneys, and he, at middle age and beyond, without the magnetism of younger men to draw to him acquaintances and make new professional bonds. His commonsense recognition that the system compels him to court publicity justifies the sacrifice of time, energy and concentration on the cases before him. The marvel is that we have as much character and ability and intellectual integrity on the elective bench as we find there. The more honor to those who have it, but the more obvious the defects of a system which makes exceptions of those men who have the qualities which should be common to all its creatures!—9 *Transactions of Commercial Club of California, p.* 311-12 (1914)

We are glad to believe that the worst practices thus described are seldom resorted to, but a system that encourages even a tendency toward them stands condemned. What self-respecting man can long be induced even to enter such lists?

We must conclude, then, that an intelligent choice of a judge, in the first instance, by a large electorate is a practical impossibility, because the proper qualifications for a judge, like those for a doctor or an engineer or a teacher, are so technical and personal that very few of the electorate are able to form an intelligent opinion of the merits of a candidate; nor can judges be selected largely on the basis of their attitude toward certain political policies, as may legislative and executive officers, for nearly all of the duties judges are called upon to perform can only be properly and impartially discharged by a rigorous ignoring of all such considerations.

What popular elections give us, at best, is an appointment by party leaders, or a popular choice between such appointments; and at worst they give us a clever personal advertiser or a sheer accident—the latter being somewhat likely to happen in districts of relatively low intelligence with a direct primary and a non-partisan ballot.

Information collected from a large variety of representative sources of professional opinion seems to indicate that in only three out of the thirty-six states that elect judges by popular vote are the results considered to be generally satisfactory—these being Maryland, Iowa and Wisconsin (notably the latter state). In five others, New York, Pennsylvania, Michigan, Minnesota and Missouri, the system is said to give fair satisfaction, and in all of the rest there are differing grades of professional dissatisfaction with it.

2. *Election by the Legislature.* In four states, as I have said, judges are chosen by the legislature. As might be expected, they are very commonly chosen from

among the members of the legislature itself, and in Vermont and Rhode Island they are almost wholly selected from this source. It seems so clear that a body like a legislature, chosen almost entirely upon political considerations, must be under the greatest temptation to let such considerations control its selections, that I suppose no political scientist could be found today who would defend such an arrangement upon theoretical grounds. It is therefore somewhat surprising to find that in Vermont legal ability, character, and success at the bar almost entirely determine the legislative selection of judges, and that in South Carolina and Virginia these are the principal considerations. In Rhode Island, particularly in recent years, political influence is said to be largely dominant.

Of course, a small and representative body like a legislature possesses an *ability* to choose capable judges far greater than the electorate can have, and so this mode of selection has inherently an important advantage over that of popular election, against which is to be set off the manifest political temptations to which it is subject. That three of the four American legislatures exposed to these temptations should have resisted them is one of the few evidences of unusual legislative virtue to be discovered in our current annals of government.

3. *Appointment by the Executive.* As already stated, eight commonwealths pursue this method of choosing their judges, a confirmation by some other elective body—council, senate, or legislature—being required in all cases. The system has certain advantages over either of the elective ones discussed. A single executive can ascertain the fitness of candidates for judgeships incomparably better than can the electorate, if he has the will to do so. He can doubtless do this better than can a body as large as the ordinary legislature, granted equally good purposes on the part of both. He is perhaps under less political temptation than are members of the legis-

lature to trade his judicial appointments for other favors, for he alone can come to a decision about an appointment, while it requires a majority or plurality of the legislature to elect, and a deadlock may be broken only by a compromise. Most important of all, the responsibility for the appointment is fixed upon a conspicuous official, and in a community where political public opinion is educated and sensitive it can influence such an official as it never can the relatively irresponsible members of a somewhat numerous legislative body.

Moreover, the appointive method has behind it the almost unanimous practice of the other leading states of the civilized world, though in fact the real selective power there is usually only nominally the executive, appointments being really made upon the recommendation of the public department of justice, composed of and in close touch with prominent members of the legal profession, thus assuring expert knowledge of the qualifications of candidates on the part of the selecting power. Historically, also this was the method of choosing judges followed in Great Britain, the country from which we have inherited our system of law and general principles of administering justice. It was the method employed in the American colonies and in most of the states of the new union until well into the nineteenth century, when it was largely swept away by the great wave of democracy which passed over the country in the second quarter of the last century. The change was made, not on account of any general complaint of the conduct or competency of appointed judges, but simply because a logical extension of the prevailing theory of democracy seemed to require the popular election of all possible officers of government, from the lowest to the highest, regardless of the nature of their duties. Once granted the premises of the equality of men and the rule of the people, and frontier logic speedily deduced the propositions that all men were

substantially equally capable of selecting all officers and of filling all offices, and that a rather rapid rotation in office was a desirable expression of this equality. As has so often happened in the history of the world, a great movement entirely sound and admirable in its essential purpose was led by blind adherance to a specious theory into those extravagancies of government from which the advocates of civil service, of the short ballot, of city commissions, and of expert governmental boards, are even now trying to extricate us. And of all these extravagances not the least has been the notion that unrestricted popular nomination and election of judges could ordinarily produce a satisfactory bench.

Of all the methods of selecting judges of which we have actually had considerable experience in this country, that of appointment by the executive has unquestionably produced the ablest and most satisfactory courts. Of the eight states now pursuing this method of choice, the testimony in Massachusetts, New Jersey, and Delaware is practically unanimous that the judges are usually admirably fitted for their tasks, and enjoy in the highest degree public and professional confidence in their ability and impartiality. The same praise is accorded to the Supreme Court of the United States, similarly chosen. In no elective state do as favorable conditions prevail. In three other appointive states, Connecticut, Maine and New Hampshire, the judges, while not usually among the ablest members of the bar, give very general satisfaction, ranking in this respect with the exceptional elective states of Wisconsin, Maryland, and Iowa, already mentioned. Probably the lower Federal courts would also fall in this class. In the remaining two appointive states, Louisiana and Mississippi, the judges give fair satisfaction, ranking in this regard with about five elective states, including New York, Pennsylvania, Michigan, Minnesota and Missouri.

It thus appears pretty clearly that in America better

judges are obtained by the method of executive appointment, subject to the confirmation of some body independent of the appointing power, than by any other method in actual use, and so it is not surprising that the efforts of various groups of persons seeking to reform the constitution of our judiciary should be directed toward the re-establishment of this method of choice. The Commonwealth Club of San Francisco, for instance, after a thorough consideration of the matter for several months voted about nine to one last year in favor of taking steps to secure an appointive judiciary in that state.

Advocates of a change from an elective to an appointive judiciary in states where the elective system has been long established are likely, however, to find their progress slow for a long time, partly on account of certain arguments that may be urged against their plan, and more, perhaps, on account of the inertia and prejudice born of two or three generations of exaltation of certain forms of democracy. The arguments may perhaps be answered, but prejudices die slowly.

The first argument that naturally suggests itself is that so long as our courts have to pass upon the constitutionality of legislation, thus giving to the judges an occasional important part in shaping at least the immediate policies of the state, the people should retain a direct control over them. I do not, of course, mean to put this baldly as a proposal that judicial elections should morally be used as means of disciplining judges who have in any instance declared unconstitutional the will of the people as expressed by the legislature, though some radicals would not hesitate to state it in these terms; but there is occasionally a judge so unconscious that times change and customs with them, and temperamentally so inhospitable to even reasonable forms of social experimentation, that he may really for a sensible period block desirable social adjustments, and such a judge might sometimes be selected or retained by appointment, when he would not by election.

My personal opinion is that the advantages of an appointive system greatly outweight this disadvantage, even granting that it is inherent in such a system, but I should not stop to argue this point. Instead, I should ask: By what courts do you in fact find constitutional restraints on legislation most strictly applied—by those elected or by those appointed? and the indisputable answer would be that on the whole the strictest courts in the United States were those filled by elected judges and that the appointed courts were far more liberal. No elective courts exceed in liberality toward the legislature the United States Supreme Court or those of Massachusetts and New Jersey, and only a very few equal them. No appointive court has ever construed constitutions as narrowly as have the elected courts of Illinois, Indiana, Missouri, Washington, and West Virginia, upon numerous occasions, and sometimes those of New York, California and Colorado. In fact, so far as I can determine from a somewhat careful survey of the matter, the circumstance that judges have been elected or that they have been appointed cannot be shown to have had any appreciable direct bearing upon their decision of questions of constitutional policy. A judge of first-class ability is decidedly more likely to accord a rational freedom of choice to the legislature upon controverted points than is a judge of less ability, because, while all judges, from the very nature of their function, are likely to have a predominantly conservative cast of mind, that of the able judge is an intellectual conservatism, while that if his inferior has become instinctive, and what is novel naturally appears dangerous. The former is therefore more open to conviction, and, as the appointive judges are on the whole somewhat superior in ability to the elected ones, they are therefore somewhat more liberal. This influence, however, is wholly indirect. A far more important factor is that of the dominant intelligent opinion in a state, and to this in most instances courts respond on

doubtful questions of policy, whether judges are elected or appointed. The liberal constitutional decisions of appointed judges in Massachusetts, New Jersey, and the United States Supreme Court, and of elected judges in Wisconsin and Oregon truly reflect the dominant intelligent public opinion in their constituents, as have the illiberal decisions of elected courts in Illinois, Missouri and Indiana.

This argument against an appointive judiciary seems, then, utterly to fail of substantiation.

Another argument against it is the likelihood that in a number of states governors would use their appointing power largely to build up a personal or a party machine. Doubtless this is true, but it is also true that in states where public opinion would sanction such a use of the appointing power, judges are now nominated and elected chiefly for political reasons. Indeed, this is precisely the situation in a large majority of our states. It is perhaps plausible that if political considerations are to be paramount anyway, then the people are better off in being allowed to choose between several political nominees at the polls than to be obliged to put up with a governor's single choice; but, when we think how seldom a judicial contest before the electorate is really decided upon an intelligent consideration of fitness for the position, this gain seems illusory. The really important fact is that the governor always *can,* if he *will,* find out about the qualifications of candidates for judical office; while the electorate rarely are able to do so. The governor may in many cases fail to inform himself or may disregard what he knows in making his appointments, but there is much more hope of finally inducing sight in a man who perversely shuts his eyes than in the most willing blind man. The truth probably is that an occasional notoriously bad candidate might be appointed who could not have been elected, but, on the other hand, the average results of appointment are pretty certain to be better than those of election.

The greatest obstacles to a more general adoption of the principle of selection by appointment are really prejudice and inertia, which are likely to be supplied with the form of argument by those political interests that would be unfavorably affected by a reduction in the number of elective offices available in making up "slates." I am not condemning prejudice and inertia. They do much more good than harm, particularly in a democracy, in insuring stability and continuity in government and in protecting well-tested institutions from too rash experiment. Very few human institutions are susceptible of a perfectly convincing logical defense from theoretical attacks. The sufficient justification of many must be that they work passably, that people are accustomed to them, that it is at least doubtful whether the new proposals would work better, and that the pangs of readjustment in changing one governmental habit for another one are certain to be disquieting if not distressing.

Now, in states where an elective judiciary is sanctioned by long usage, so that sudden change may be difficult and perhaps undesirable, is it not possible to suggest some combination method by which responsible expert selection and popular assent may join hands in choosing judges? Let us postpone a consideration of this possibility, until we have reviewed the remaining elements in the problem—tenure, compensation and retirement.

POPULAR ELECTION OF JUDGES [1]

Where the so-called popular election of judges prevails, judges are not in fact selected by the electorate; they are appointed.

There is no such thing as the selection of judges by popular election. It is impossible in an electorate of any size and a society of any complexity for the voters col-

[1] By Albert M. Kales. Part of an address delivered June 27, 1918, to the State Bar Association of Wisconsin, and published in the *Report of the Proceedings of the Association for* 1916-1918. p. 554-63.

lectively to register their will in selecting the lawyer among them whom they desire to act as judge.

Knowledge of the fitness of individuals to perform the difficult functions of the office of judge must be known before anything like selection is possible.

How can an electorate of any size have any sufficient knowledge upon which to make a selection from among any considerable body of lawyers to fill judgeships?

It is obviously impossible for an electorate of any size to have any collective idea of those among the lawyers whom it wishes to act as judges. It is even more clear that the electorate can have no collective idea of the qualifications of different lawyers for exercising the judical function. It would be a problem for a single individual who had an extensive knowledge of lawyers and who observed them closely for a considerable period in the practice of their profession.

We are past thinking that any lawyer can be a judge. In metropolitan districts particularly, we have come to the view that to be a successful and efficient judge requires a highly trained professional expert. The electorate would not think of undertaking to select at a general election the engineer who is to design a bridge upon which thousands of the population each day must pass in safety. It is quite as absurd for an electorate to attempt a selection of the very special talents which are required in a judge in passing upon the rights to life, liberty and property of thousands of citizens.

Furthermore, lawyers who are willing to become candidates for a judgeship have, as a general rule, no real popular following of any considerable size in an electorate. Even judges after they have been on the bench have no such popular following that they can be said to be a popular choice. The position of a single judge in a district containing one hundred thousand voters and upward is ordinarily too inconspicuous to enable any man who is willing to occupy the place to secure a popular

following. A lawyer or a judge who secures a hold upon the majority of a numerous electorate will inevitably be led to a candidacy for offices of greater political importance than a judgeship.

What happens when the electorate has placed upon it the impossible task of selecting judges is that some sort of informal *de facto* method of appointment arises.

For instance, in Wisconsin I am informed that you have developed a *de facto* method of appointment by the lawyers and the governor. Mr. Harley, the secretary of the American Judicature Society, investigated the matter a number of years ago and has given me the following result of his observations:

A strong tradition has been built up in Wisconsin of re-electing sitting judges. This means, and the actual fact is, that vacancies on the bench occur almost wholly by death or resignation by the incumbent. When this happens the bar (and that means the leaders among the bar) at once set about to fill the office. The qualifications of various lawyers are discussed in a semi-public manner. There is sufficient decorum so that candidates do not come forward personally to advance their claims. A bar primary is then held, all the candidates having a fair chance. The bar, as a whole, accepts the result and regardless of party, supports the winner. The actual power of appointment for the unexpired term rests with the governor. He, however, is expected to, and customarily does in fact, appoint the man recommended by the bar. When election day comes around the judge so appointed is supported by the bar regardless of party, because he was originally the nominee of the bar and because he is a sitting judge. He is regularly thereafter supported at elections until he dies or resigns. So strong is the tradition and feeling in favor of electing and re-electing judges who have been appointed originally in the manner described, that sitting judges will prevail even against candidates who are admittedly abler lawyers. The system

of retaining judges in office during good behavior has been found by the people of Wisconsin to be worth more than the replacement once in a while of a satisfactory man with one who might and who probably would do better.

Whatever pride there may be in such a system of selecting judges, it is a pride in the way the so-called plan of popular election has been developed into an appointment by the leading lawyers of the district, with the concurrence of the governor.

On the other hand, in Chicago, where there is a typical long ballot and the parties are well organized and powerful, the appointing power is lodged with the leaders of the party organization. These men appoint the nominees. They did it openly and with a certain degree of responsibility, under the convention system. They do it now less openly and with less responsibility under the compulsory and partisan primary system. If one wishes to test the soundness of these conclusions let him inquire his way to a judgeship in such a district or listen to the experiences of the men who have found their way to a judgeship or have tried to obtain the office and failed. In almost every case the story is one of preliminary service to the organization, recognition by the local organization chief and through him recognition and appointment of a nomination by the governing board of the party organization. Those who do not go by this road do not get in. The voter only selects which of two or three appointing powers he prefers. Whichever way he votes he merely approves an appointment by party organization leaders.

In New York state the judges have a fourteen-year term. In parts of the state outside of New York city they are usually re-elected, which means practically a life tenure. When a vacancy occurs, the leading political leader or leaders of the dominant party in that district of the state meet for the purpose of determining who shall

be nominated. The result is in fact an appointment by political party leaders subject to confirmation by the electorate.

How do these *de facto* methods of appointment work? Sometimes well, sometimes ill. When they work well, it is supposed that the system of popular election of judges has been vindicated. When they work ill, the popular election of judges is supposed to have broken down. Neither statement is correct. In both cases alike, a *de facto* method of appointment has worked well or ill, as the case may be.

I even remember one instance where the Chicago method of *de facto* appointment by political party leaders worked out extremely well. It was when the Chicago Municipal Court act became effective. Here was a case of selection to fill vacancies. There were no incumbents in office and therefore no question of retirement. There was great popular interest in the new experiment. The Republican Party political leaders were in power in the city of Chicago where the new judges were to be elected. They appointed a sub-committee to select the best material available. The chairman of this sub-committee was himself a prominent lawyer. The leaders of the bar were consulted. A list of names was made up regardless of whether the men would accept or not. The chairman of the committee sought out the candidates suggested. In some cases he even visited them at their offices and labored with those who did not want the place, insisting to them that it was a public duty which they should perform if possible, and in some instances men would not and did not think of seeking the place took the nomination. In that way a splendid list of candidates was nominated and elected. That was the first and last time within my knowledge that anything of the sort has ever happened in Chicago or Cook County.

Now, what are the objections to these *de facto* methods of appointing judges which spring up under the so-called elective system?

The theoretical objections are obvious. Theoretically, the proper appointing power is one which is legal, conspicuous, subject directly to the electorate, and in a great degree interested in and responsible for the due administration of justice by the courts to which the judges are appointed.

The *de facto* appointing powers which arise under the so-called elective system frequently violate every one of these requirements. The appointment by political party leaders is not legal. It is extra-legal—that is, it was not contemplated by those who designed and advocated the elective system. It is not sanctioned by any law or by the Constitution. The appointing power in the party organization leaders is not conspicuous. On the contrary it is very obscure—so much so that many voters will be found who still believe that the application of the elective principle to the selection of judges means a choice by the people. The party organization leaders wielding the appointing power have no responsibility for the due administration of justice. They have the minimum degree of interest in it. Sometimes ugly hints get abroad that particular party leaders are actually interested in securing as judges men who may be relied upon to give special immunity to certain offenders against the criminal law. The motive is very strong on the part of the organization chiefs to reward with an appointment to the bench those who have done more in the way of political service to the organization than in practice in the courts. Finally, the appointing power in the party organization leaders is not as directly subject to the electorate as it should be.

The practical objections to the *de facto* methods of selection which arise under the elective system vary. They are obvious enough when the political party leaders appoint as a reward for political service rather than for attainments as lawyers practising in the courts. Even, however, if the *de facto* method of appointment works well, (as I believe it is said to do in Wisconsin and in

parts of New York state outside of the city of New York), there is still a practical objection to it. The methods is too unstable. In a few years with a change in the population or with a change in political ideas, often the result of sudden growth, the old order, the old habit is completely upset. The former custom is no longer respected. New political forces start to fill all offices for which the electorate may select candidates. Your excellent method of appointment by the governor of a new judge to fill an unexpired term (with the advice and consent of the local bar), and the subsequent election and re-election of the appointee is rudely broken in upon. Soon you find that new political forces grasping after political power have developed a new *de facto* method of appointment in which the governor and the lawyers have little, if any, part.

When one is confronted with the question of the best method of selecting judges there is only one course to take and that is to consider the best method of appointment.

I confess that the various *de facto* methods that spring up under the elective system are the least satisfactory.

When the elective system results in appointment by party political leaders as a reward for purely political services, it is at its worst. I have often thought that it would be greatly improved if the power of appointment were openly conferred upon the executive committee of the County Central Committee representing the party most generally successful in the last preceding election. Such an appointing power would at least be legal and conspicuous and would place a certain degree of public responsibility upon those exercising the appointing power.

Even the excellent Wisconsin *de facto* method of appointment is objectionable because of its instability.

Appointment by the governor, as in Massachusetts, is an improvement over the usual *de facto* method of ap-

pointment developing under the elective system. It does not follow, however, that appointments by the governor will work satisfactorily. The governor's responsibility for and interest in the due administration of justice is often times remote. Justice by the courts is administered by a department of government separate and independent of the executive. Many state executives are busy building and keeping in repair the governor's political organization, which is sometimes separate from various local political organizations controlling the name of the party to which the governor ostensibly belongs. The maintaining of the governor's political organization is done by appointments to office and it is to be expected that appointment to judgeships would in many instances be used as freely as appointments of heads of the state insane asylum and the penitentiary. Furthermore, our state executives have legislative programs and are likely to trade appointments for support in the legislature at a critical moment.

I confess to a liking for the principal of appointment applied in the British constitution.

We have received our language from England. We have received our laws from England. I have even heard orators speak enthusiastically about something so anciently English as Magna Charta. In the nineteenth century we have joined England in forwarding the social principle in individualism. In the twentieth century we shall, no doubt, join with England in modifying the practice of that principle and reorganizing on the lines of greater collectivism. We are and for nearly a century have been in accord with England in supporting the same ideals of international morality, justice and peace. This war has revealed to us that the paths of England, its great self-governing colonies and ourselves lie side by side.

What is it then that has caused us to be blind to the splendid examples of political and governmental genius

which have appeared in England in the latter part of the eighteenth century and developed throughout the nineteenth? Why, for instance, when the rest of the world has reached out for it, have we been blind to the development of that wonderful instrument of democratic representative government—the cabinet or parliamentary system—in which the executive and legislative power are for the moment united, but where the executive power is subject to the legislature and the legislature is subject to the people. Has it ever occurred to you that this great constitutional expedient of democracy has been copied the world over? The self-governing British colonies of Canada, Australia and South Africa have it. The French republic adopted it. Have you forgotten that little Piedmont used the principles in its constitution and under Cavour learned to use it so successfully that when it became the political leader of Italy the adoption of the cabinet system was carried into the constitution of United Italy? Even in Austria and the Balkans, there are traces of its existence. The Russians grasped at it. The Japanese in the far east use it. In all the world the two conspicuous examples of nations which would have none of it are the United States and Germany. Bismarck refused it because it was the device of democratic as opposed to autocratic rule. We passed it by because it was British—because it developed and came to perfection subsequent to the time when the minds of the people of this country and the minds of succeeding generations had been poisoned with a prejudice against all things British.

It is my guess that this prejudice has been kept alive because the youth in our schools have been taught generation after generation that the principal events in the history of England since 1776 has been the battles of Lexington and Bunker Hill, Saratoga and Yorktown, the burning of Washington and the Battle of New Orleans, "54-40 or Fight," the Mason and Sidell incident and the Venezuela boundary dispute. While this course of edu-

cation has been going on here, the modern British view of the American Revolution has come to be that George Washington was a typical liberty-loving English gentleman, doing his duty as an Englishman in rebelling against a despotic, and tyrannical German king. In view of the events of the present we should see to it that the youth of America is taught the wonderful history of the achievements of England in the nineteenth century, especially in the art of constitutional democratic government and political institutions as well as her heroic action in entering the war when Belgium was invaded, and the glory of her arms on many battle fronts in this stupendous World War—to the end that the door may be opened once again to us to consider the merits of English institutions as models upon which to found and enjoy the benefits of liberty and democracy, and that the political scientist who is considering the best method of appointing judges may not have to hide the fact that he has adopted a principle theoretically correct and worked out practically in the British constitution.

The method of appointing judges in England is not very well understood. In my experience it is difficult to find it stated anywhere in books. I secured my information directly from Lord Bryce. The appointment of all English judges, except the judges of the Court of Appeal, is in the hands of the Lord Chancellor. The appointment of the judges of the Court of Appeal is made by the Lord Chancellor and the Prime Minister jointly. Now, who is the Lord Chancellor? He is a member of the government in power. He goes in and out as the government in power goes in and out. In other words, he is (like the cabinet) directly subject to the majority of the House of Commons and indirectly to the electorate. So is the Prime Minister. In other words, they have in England landed the appointing power of judges in the hands of an officer who is subject to the House of Commons and to the electorate. The same principle

would be applied in this country if we elected a chief justice for the state for a term and gave him the power to fill vacancies among the judges.

In giving the power of appointment to the Lord Chancellor the British have given it to the head of the judicial system. Especially under the modern English judicature acts the Lord Chancellor is the administrative head of the entire system of courts. He, as the head of the judicial council having in its hands the rule-making power, is responsible for the due administration of justice to the government and to the people. This responsibility has made him interested in a higher degree than ever before in the due administration of justice. We should be using the same principle if the elected chief justice for the state who had the power to fill vacancies among the judges was the head of a judicial council of judges for the state, entrusted with large powers to make rules and regulations for the sittings and handling of business by the judges, the specialization of effort among the judges, and the power to make rules of practice and procedure. Such a chief justice would be responsible for, and therefore interested in, the due administration of justice in the same way and to the same degree that the British Lord Chancellor is. That is the sort of a state officer in whom to vest the power of appointing judges. That is the sort of an appointing power which we should endeavor to develop when we begin our constitution-making over again.

Curiously enough, such a method of selecting judges exists to a limited degree at this day in the state of New Jersey. The New Jersey Chancery Court consists of a chancellor and seven vice-chancellors. The chancellor is appointed by the governor with the consent of the senate and holds office for seven years. The chancellor appoints the vice-chancellors, each for a seven-year term. The satisfaction given by the New Jersey chancery court is testified to by New Jersey lawyers. The high quality of

work done by the vice-chancellors is indicated by the fact that their opinions are included in the state reports and, in my experience, are not infrequently cited by lawyers as if they were opinions of a court of last resort.

ARGUMENT BEFORE THE COMMITTEE OF THE MASSACHUSETTS LEGISLATURE, FEBRUARY, 1922[1]

As secretary of the Massachusetts Bar Association, I have presented to you the judgment of such members of the Executive Committee of that association as I have heard from in opposition to proposals for an elective judiciary. I also speak as an individual in opposition to this measure and in so doing I am simply expressing my own personal convictions and reasons.

The subject is too important to be confused with epithets or abuse on either side. I know that people honestly differ about this matter and I shall argue on the assumption that the supporters of the measure before you are sincere in their belief that it will be for the interest of the people of the commonwealth as a whole. I do not agree with them and I ask that the opposition to the measure be listened to and considered in the same spirit of fairness, and I know that your committee will so consider it.

The question is not a new one in this or any other state in this country. It is as old as the Constitution itself. It was raised and considered before the Constitution was adopted. It was publicly brought before the people again at least as early as 1806, and it has been discussed from time to time before constitutional conventions and before the legislature ever since. There have been three constitutional conventions and about one hundred and

[1] By F. W. Grinnell. *Massachusetts Law Quarterly.* 7: 122-36. April, 1922.

forty legislative sessions since 1780 at which this subject could be considered. The latest extended discussion was at the recent constitutional convention of 1917, where it was finally rejected on the 14th of June, 1918, by a vote of one hundred and twenty-five to thirty-two as appears by the *Convention Journal,* pages 638-9.

I do not propose to argue the question merely on the ground of past history, but it would be absurd for any one to say that the fact that any institution of government has survived the political storms of one hundred and forty years is not a fact of importance to make fair-minded men pause and reflect when it is proposed that it should be changed.

In thinking over the method of approaching the subject most likely to be of assistance to your committee, it seemed to me that Chief Justice Shaw has suggested that method of approach in his permanent message to the bar and the people of Massachusetts in his last public utterance. You will find the passage on page 188 of Judge Chase's life of the great chief justice:

> Above all let us be careful how we disparage the wisdom of our fathers in providing for the appointment to judicial office, in fixing the tenure of office, and making judges as free, impartial, and independent as the lot of humanity will admit. Let no plausible or delusive hope of obtaining a larger liberty, let not the example of any other State, lead you in this matter to desert your own solid ground, until cautious reason or the well-tried experiment of others shall have demonstrated the establishment of a judiciary wiser and more solid than our own.

Imagine yourselves for a moment in the presence of the man, who was one of the great judges in American history, after he had finished the thirty years of his distinguished service as a judge. Imagine him sitting down quietly with you gentlemen in your committee room to talk this matter over and asking you whether "cautious reason or the well-tried experiment of others have" since his death in 1860, "demonstrated the establishment of a judiciary wiser, and more solid than our own?" I take it that is the question which you must naturally ask your-

selves because that is the question which our wisest judge left as a permanent question to be considered by the people of Massachusetts and their representatives in connection with this matter.

In answering that question, you naturally will ask yourselves other questions suggested by the discussion before you, some of which I shall mention.

1. Why is it that the West Publishing Company reports in a public advertisement on the inside of the back cover of the *Docket* for December, 1921.

That a careful investigation discloses the fact that the decisions of the Supreme Court of Massachusetts are cited more frequently than those of any state court?

2. Making all due allowance for the imperfect working of any human institution of government, is it likely that a change to an elective judiciary will result in less politics and more independence and impartiality in the administration of justice? Is it true that the system of selecting judges in New York, Illinois and elsewhere works in practice in so admirable a manner as the supporters of this measure believe it to work?

3. How much do we know as to the exact details in connection with the election of judges in these other states?

4. It has been suggested in argument before you that the leaders of the New York bar have not suggested a change. Why is it that the late Joseph H. Choate, who was more than fifty years at the New York bar and who was described as "the heart not less than the head" of the American bar, volunteered this statement in February, 1917, a few months before his death, in a letter, a copy of which I will submit to your committee. (See *Massachusetts Law Quartly.* May, 1918, page 312.) He said, "I feel intense interest in the judiciary of Massachusetts and cannot believe that our grand old state will depart from its stoutly maintained conviction that an appointive ju-

diciary is the only admissible one." Why did he volunteer that statement?

5. Why is it that about the time when the New York constitutional convention of 1915 met a committee of leading members of the New York bar, including among others Alton B. Parker and Morgan J. O'Brien, both former members of the New York Court of Appeals, adopted a recommendation containing the following statement:

> Your committee is of opinion that the best and most practicable method of securing learned, experienced, upright and impartial judges and of maintaining their independence is by appointment and not by election. . . .—*Massachusetts Law Quarterly, May,* 1918. *pages* 307-8.

The recommendation of these gentlemen was not followed by the New York constitutional convention, but in view of this recommendation the leaders of the New York bar cannot be relied upon as enthusiastic supporters of the idea of an elective bench. Why not?

6. Turning to Illinois, let us see what a careful student of practical conditions in Cook County says about it. In a book called *Unpopular Government in the United States,* Albert M. Kales, a practising lawyer at the Chicago bar, writes as follows:

> In a metropolitan district, . . . where there is a large population and a governmental plan which reduces the most intelligent inhabitant to an extreme degree of political ignorance as a voter, and the establishment of extra-legal government by politocrats is thus secured and fostered and becomes the real government, the judges, though the electorate regularly votes to instal them in office, are not in fact elected at all. They are appointed. The appointing power is lodged with the politocrats of the extra-legal government. These men appoint the nominees. They do it openly and with a certain degree of responsibility under the convention system. They do it less openly and with less responsibility when primaries are held.
>
> If you wish to test the soundness of these conclusions inquire your way to a judgeship in such a district or listen to the experiences of the men who have found their way to a judgeship or have tried to obtain the office and failed. In almost every case the story is one of preliminary service to the organization, recognition by the local organization chief, and through

him recognition and appointment of a nomination by the governing board of the party organization. Those who do not go by this road do not get in. The voter only selects which of two or three appointing powers he prefers. Whichever way he votes he merely approves an appointment by politocrats. The judges in a metropolitan district where the extra-legal government rules and where elections for judges are held are not subject to a recall merely. They are subject to a progressive series of recalls. They are subject to recall by the politocrats who sit upon the governing board of the party organization. These may refuse a nomination at the time of an election. If the judge secures the nomination he may be recalled by the wing of the organization knifing him at the polls. He may be, and frequently is, recalled by reason of an upheaval upon national issues. . . . The plain truth is that in a metropolitan district the selection of judges by some sort of appointing power cannot by any possibility be avoided.

Why is it that we find a man of the ability and character of Kales making such statements? Is it not likely that there are some undesirable details in Illinois politics connected with the bench which we do not want in Massachusetts? Was there not a political attempt last year by a political leader in Chicago and his associates to fill up all the judicial vacancies for very practical political purposes? Was not this judical election advertised all over the United States through the press? The fact that the movement was defeated by a vigorous and expensive campaign which aroused the Chicago bar is to the credit of that bar, but it is not to the credit of the system that the business of the courts and of the community should be interfered with by such elections.

7. How are the campaign expenses paid in judicial elections in these other states? Are the judges assessed? Is there a regular percentage of their salaries during a period of the term which goes to some political organization? How is it done? I do not pretend to know. Most political campaigns cost somebody something in an important election. The country has just been edified by much public criticism of the recently seated senator from Michigan for spending too much money in his campaign. It has been publicly stated how much money was spent

by his opponent. Do we want to put the judiciary of Massachusetts in a position in which such expenditures and such criticisms of expenditures are invited?

8. Turning now to Ohio, we have had some very direct evidence recently produced by Massachusetts men and also by a leading lawyer of Cleveland, Ohio, who addressed the members of the Massachusetts Bar Association at its annual meeting at New Bedford, last October. The judges of the Municipal Court of Cleveland are elected for short terms. Two or three years ago, the chief justice of that court was tried for murder in the second degree. The jury disagreed. He was tried a second time and acquitted. He was then found guilty of contempt for perjury, committed during the trial for murder. You will find the story told by Mr. Amos Burt Thompson in the January number of the *Massachusetts Law Quarterly* for 1922, copy of which I will hand you. This dramatic incident, while it related to only one judge, stirred up such an agitation that a citizens' committee was formed, of which Mr. Thompson was chairman, and they did a thing which is unique in the history of America. They invited men from different parts of the country to come to Cleveland and make a study of their system of administering justice. The subject of the criminal courts was assigned to two Massachusetts men. What did they find as to the practical working of an elective judiciary in the Cleveland Municipal Court?

Mr. Smith has summarized it in a recent article, from which I quote: (*Massachusetts Law Quartly.* August, 1921, pages. 185-6.)

> In the course of . . . electioneering the judges are forced to speak and act in a manner inconsistent with and repugnant to any decent conception of judicial office. With the bogey of re-election constantly hovering in the foreground the covert pressure exerted by groups and organizations cannot be disregarded as it should be. The political lawyer with his control of votes becomes a man of importance, to be placated if possible. As his potential competitors at the next election who are off the bench are continually striving to create and develop their own

influence in the community, the judge on the bench must do likewise. He must become known, his name must be seen in the papers, and therefore he gets an assignment to sit in the criminal sessions of the court because criminal cases have superior news value. The doing of justice forbids the granting or receiving of favors, but in an open election the judge must beg for votes and, after he has lost his private practice through years of service on the bench, he must beg hard. It is next to impossible to make an effective political speech without at least impliedly promising something to somebody. Such conditions destroy scruples and cause a progressive deterioration from bad to worse, so that in Cleveland today we find judges permitting the solicitation of campaign funds from lawyers who practise before them and the insertion of large paid advertisements of themselves in the papers. In one instance a judge has assumed to administer justice in a court room adorned with political placards urging all those in attendance to vote for him. The method of selecting judges now obtaining in Cleveland puts a premium on self-advertisement and compels the currying of favor. It is detrimental to all parties concerned, and is thoroughly bad.

Turning to the address of Mr. Thompson, he says:

We do find that there is particularly prevalent the baleful influence of the lawyer who practises more politics than law. That is naturally more harmful in a community where the elective system prevails.

Mr. Thompson produced a campaign card, which is reproduced in the January number of the *Quarterly* on page 67, copy of which I will hand to your committee.

When one looks at that campaign card and considers the practical opportunities of self-advertising and mud-slinging which sometimes accompanies political campaigns for votes even in the commonwealth of Massachusetts one naturally wonders what would happen in a judicial election in Massachusetts. I think your committee will naturally ask yourselves whether it can possibly be for the interest of the people of Massachusetts to subject our judges to the ordeal of such a campaign to force them into politics, into the business of promising things which they have no business to promise directly or indirectly and telling everybody what good judges they are and what a fine brand of Massachusetts justice they

will administer, and you will ask yourselves whether it will be good for the people of Massachusetts or for the bar of Massachusetts to begin to think more than they do today about the political affiliations or obligations, or influences connected with our judges.

9. Much of the criticism before your committee as well as in the constitutional convention was directed at judges in the district courts or at special justices of those courts. But, is the elective system likely to make them any better? Is not the better course that of improving the district court system in such a way as to make the work of those judges more important, more responsible, more useful to the people of the commonwealth and, therefore, more important and responsible in the eyes of the appointing power and of the judges themselves? Without intending to idealize the district courts or any other courts in Massachusetts, I submit that much of the difficulty with the district courts is not so much the fault of the judges as of the antiquated system which renders much of their work ineffective and wastes much of the judicial power that might otherwise be effectively used.

10. There is another aspect of the question before you which is not always emphasized as it should be. It is particularly important upon any genuinely democratic theory of government that the people should be able to get the benefit of the best judicial capacity whenever and wherever it may be found, whether it is in a man who is sufficiently well known or "available" to be elected or not. One of the most serious objections to an elective system is that it absolutely shuts the door of the bench to those men whose habits, whose training, and whose tastes are such as not only to make them not available under an elective system, but prevent them from becoming candidates. There are many men who have helped to make the Massachusetts courts great who would not have sat on the bench under an elective system. It is not necessary

to mention them all, but I will mention four: Chief Justice Parsons, Chief Justice Shaw, Chief Justice Gray, and Chief Justice Holmes. The list could be enlarged by the addition of names of others, both among the living and the dead, but if your committee will consider carefully the history of these four men whom I have mentioned, you will, I thing, be satisfied that Massachusetts would never have had their services on the bench under an elective system. Parsons was appointed without his knowledge, and accepted the position at a sacrifice of about three-quarters of his income.[1] Shaw did about the same.[2] Gray and Holmes, both of whom were appointed later to the Supreme Court of the United States, were men whose training and habits as scholars were such that they would not have become candidates for an elective position. Would Massachusetts have been better if these men had never appeared upon the bench?

One of the speakers in support of this measure spoke of the appointive system with tenure during good behavior, as we have it in Massachusetts, as a survival of the monarchical system of feudalism in England. But those who feel this way seem to forget that the tenure of judges during good behavior did not come in England until the Act of Settlement in 1700, and that, instead of being a monarchical plan it was a great step taken to protect the English people against the Crown because, up to that time, the judges held their offices only during the pleasure of the King and it was through the power of removal that the Stuart kings had been able to dictate to the courts. The Act of Settlement did not apply in the colonies and it was because of this fact that one of the controversies arose immediately preceding the Revolution. When King George III undertook to pay the salaries of the Massachusetts judges, a dispute arose over

[1] For the story of Parsons' appointment see *Massachusetts Law Quarterly*. May, 1917. p. 523-4; as to income see p. 538.

[2] For the story of Shaw's appointment see *Chase*. p. 134-40; as to income see p. 131.

this matter between John Adams and Gen. William Brattle, which is described in the May number of the *Massachusetts Law Quarterly* for 1917, pages 397-8. John Adams demonstrated the fact that there was nothing in the commissions of the judges of Massachusetts at that time to prevent their removal by the Crown and that they were, therefore, in as dependent a position as the judges under the Stuart kings. Accordingly, the Massachusetts principle of an independent judiciary, instead of being a survival of a monarchical institution, was a recognition of the principle which was established in England in 1700, as one of the great steps in restraining the exercise of arbitrary power. The movement for the election of judges which swept over other states in the middle of the nineteenth century in the name of "democracy," merely restored the subservient condition of the political judges in England before 1700. Massachusetts stood by the principles on which her character as a state is based. Shall she surrender them now?

Some remarks of Dean Pound were referred to by one speaker in criticism of the action of some courts in other states, but Dean Pound cannot be used in support of an elective bench, for he appeared before the Judiciary Committee of the Massachusetts legislature a few years ago and said that the people of Massachusetts did not know what an elective judiciary meant, and that they ought to thank God that they did not have one. If any further and more recent evidence of Dean Pound's views on this subject are desired, they can be found in his summary of the administration of the criminal law in Cleveland, Ohio, which appears as part of the *Cleveland Survey,* recently published. [1]

The address of Ex-President Taft, now chief justice of the Supreme Court of the United States, delivered before the American Bar Association at its meeting in 1913 also may be read in connection with this subject.

[1] See also *Massachusetts Law Quarterly.* May, 1918. p. 314-15.

It will be found on pages 418-35 of the reports of the American Bar Association for that year.

An Answer to the Charge of "Usurpation by the Courts"

There is another kind of attack upon our judicial system in Massachusetts which is directed peculiarly at the Supreme Judicial Court. A prominent member of the bar has been quoted in support of this comment. It is said that our courts have usurped the power of declaring unconstitutional statutes passed by the legislature, and that such power ought not to be trusted to judges, that it was never intended to be trusted to judges and, if they are to have it, they should be subject to popular election. I appreciate the sincerity of the belief of many supporters of the measure before you in this point of view, but I submit that it is mistaken. The history of the subject in Massachusetts has been largely forgotten. It is common to say that the courts have usurped this power and that they follow in the footsteps of John Marshall who is referred to as the first great usurper in this field. Those who say this seem to forget that it is not a question of power of the courts. It is a question of the duty of the courts.

This duty was first proclaimed, developed, and established in Massachusetts as one of the central ideas of the Revolution a quarter of a century before John Marshall wrote the opinion in *Marbury v. Madison.* It is one of the hardest duties which the courts have to perform. It is a duty in which they assist the legislature to an incalculable degree. The doctrine that acts of the legislature should be subject to the test of constitutional principles by an impartial, independent court, was the great contribution of James Otis to the history of American law in his argument against the Writs of Assistance delivered in the Old State House in 1761. This duty was written expressly into the last article of the Constitution

of 1780, where it has remained ever since. That article provides that the Constitution shall be part of the "law of the land" and shall be "prefixed" to every edition of the laws of the commonwealth, thus making it the duty of every judge to read the Constitution before he reads a single statutory word. In 1782, the Supreme Judicial Court speaking through its first chief justice, William Cushing, expressly applied that Constitution to a case before it involving the issue of slavery and, by that decision, ended slavery in Massachusetts. (See *Massachusetts Law Quarterly* for May, 1917, page 437.) That decision has been generally forgotten in the discussions of constitutional law. Why is the picture of James Otis in the State House?

That is not all. The movement for the formation of a state constitution after the Revolution received its main impulse from Berkshire County. The Berkshire County men, under the lead of Thomas Allen, refused to allow the highest court of the then-existing government to sit in Berkshire County until a constitution was formed which should be a test of legislation. The men in Berkshire County were afraid of being subjected to the unrestrained legislation of a body which met in the more populous eastern seaboard countries of the state. The movement for a constitution in Berkshire can have no meaning except that it should be the duty of the courts to apply the constitution directly as law and to test the validity of statutes in the light of constitutional principles.

As I think you will see, when you consider it, instead of having usurped power in this respect, the American doctrine of constitutional law imposed this burden on the courts as a duty and this duty was first conceived and fully developed in the commonwealth of Massachusetts. From this commonwealth, it spread throughout the nation. It is the great contribution of America and, to a considerable extent, of Massachusetts, to the science of government. That mistakes have been made here and

there by this or that court in the performance of this difficult duty is doubtless true, but that does not lessen the fundamental importance of the duty. Certainly our Massachusetts court has generally been regarded as one of the most enlightened in the performance of this duty.

A sentence used by Ex-Governor Bates at a recent legislative hearing in describing the responsible powers of our Supreme Judicial Court and their relation to the future of the state has been twisted out of all perspective in some of the newspaper reports and in, at least, one editorial. It is true that the court has the decisive voice on constitutional questions so far as the interpretation of statutes and the constitution go, and when one looks at the court solely with that in view it is easy to attribute an exaggerated position to the court. But, when we consider the wide range of legislative power in all its bearings, including the power to pass new statutes, to formulate and submit constitutional amendments, etc., it is obvious that the court merely performs one of several essential functions of government in our system, and it is a function which is becoming recognized in other parts of the world, rather than the reverse. Dean Pound has called our attention to the following facts:

—the American development of the common-law doctrine of supremacy of law, in our characteristic institution of judicial power with respect to legislation, however much assailed at home, is commending itself to peoples who have to administer written constitutions. In the reports of South American republics we find judicial discussions of constitutional problems fortified by citations of American authorities. In the South African reports we find a court composed of Dutch judges, trained in the Roman-Dutch law, holding a legislative act invalid and citing *Marbury v. Madison* along with the modern civilians. Notwithstanding a pronouncement of the Privy Council in England, the Australian bench and bar insist upon the authority of Australian courts to pass upon the constitutionality of state statutes, and the Privy Council itself has felt bound to pronounce invalid a confiscatory statute enacted by a Canadian province. Even continental publicists are found asserting it a fundamental defect of their public law that constitutional principles are not protected by an independent court of justice.

The duty of the courts in regard to legislation was expressly recognized in the I. and R. Amendment as applicable to legislation under that provision.

If the members of the legislature would pause and consider for a moment what the situation might be if this duty in regard to statutes were not imposed upon the court and the legislature was left with absolutely unrestrained freedom of action, they would realize how great is the assistance rendered, not only to the people, but to the legislature itself in the performance of its difficult duties by our court, and the farsightedness of the men of 1780 in recognizing the importance of this function in the plan of government which was then framed and adopted.

In the long run, the court and its functions is, as it has been described from the beginning, in many ways the weakest of the departments of government from a political point of view, because the judges cannot defend themselves against attack and their only real power arises from the general soundness of their work and the general confidence and respect for the courts resulting from that work, as tested by its practical results over a long period of time. The general confidence and respect for the courts of Massachusetts results from the fact that most of their work has stood the test of the practical life of the community for over a century.

Just as John Marshall and his associates stated in their opinions the ideas of government which held the nation together during the Civil War—just as Chief Justice Shaw and his associates expounded the common law and constitutional law in such a manner and to such an extent as to convince succeeding generations of lawyers and stabilize the government of Massachusetts, so I believe our court today in its judgments in general is reflecting the sound instincts of the great body of people throughout the commonwealth. Thomas Allen, the leader of the Berkshire Constitutionalists in 1776, stated

the reason for the Massachusetts constitution and for the function of the court in applying it, and it has never been stated more powerfully since that time. He said, as you will see on page 12 of the pamphlet submitted herewith:

> Every man by nature has the seeds of tyranny deeply implanted within him so that nothing short of omnipotence can eradicate them. . . . The first step to be taken . . . is the formation of a fundamental constitution as the basis and groundwork of legislation. . . . Knowing the strong bias of human nature to tyranny and despotism we have nothing else in view but to provide for posterity against the wanton exercise of power which cannot otherwise be done but by the formation of a fundamental constitution. . . . Let it not be said by future posterity that . . . we made no provision against tyranny among ourselves.

The meaning of this movement in Berkshire County, which was a movement of laymen and not of lawyers, and the debt that we owe to Thomas Allen generally has been overlooked, but it is time that they were recognized again. The Massachusetts constitution and indirectly the Constitution of the United States owe more to the initiative and power of statement of Thomas Allen than is generally realized. What he said has as much significance today as it had between 1776 and 1780.

Do the people of Massachusetts as a whole really believe that our judges today and during the past one hundred and forty years have been controlled by sinister influences? The public confidence and respect for the courts in this state certainly do not indicate that as the general opinion of the people. I might go on and refer to the great speech of Rufus Choate in the constitutional convention of 1853 in support of our Massachusetts system of judicial selection and tenure. (Reprinted in *Massachusetts Law Quarterly*, January, 1917, page 221.) But I will close by quoting a passage from a striking and courageous speech by Hon. Frederick W. Mansfield in December, 1916, at a dinner of the Boston University Law School Association. He said:

> As one who has had some experience in the trial of so-called labor cases, I hope I may be pardoned if I venture to say a

personal word of commendation and approval of the Supreme Court of Massachusetts. In this practically new and unexplored field our Supreme Court has probably penetrated further than any other civilized tribunal. In many of its decisions it has been most liberal in its views and in its treatment of the workman. In many cases it has laid down rules of law that have been and will be invaluable to organized labor. It has been most painstaking and careful, eminently fair, and absolutely fearless. It has lived up to the highest, noblest, and best traditions of Massachusetts, and no greater praise can be accorded to it.

And surely the poorest and the humblest member of society needs just such a Court—needs a fearless judiciary. He needs able, honest. and strong judges far more than his more wealthy and more fortunate neighbor. The wealthy litigant can surround himself with eminent and high-priced counsel—the poor litigant must often be content with inferior counsel, or with none, in which case he must depend entirely upon the judge. The judiciary is the best defensive bulwark of the weak against the encroachments of the strong, the powerful, and the selfish. —*Massachusets Law Quarterly. January,* 1917.

And so, gentlemen, I ask you again to imagine yourselves in the presence of Chief Justice Shaw and to answer the question which he suggested to you, whether "cautious reason or the well-tried experiment of others" has "demonstrated" clearly to your satisfaction "the establishment of a judiciary wiser and more solid than our own?"

BRIEF EXCERPTS

In some states we have had the amusing spectacle of electioneering judges who publicly pledge themselves to decisions if returned to office.—*Raymond L. Buell. Nation.* 114: 715. *June,* 1914.

The marvelous spectacle of the greatest commercial city in the western world without a single great judge in itself invites criticism and demands consideration. —*Albany Law Journal.* 36: 504. *December* 24, 1887.

To say that a judge, elected as our candidates usually are, under the present system of short terms, can enjoy

that freedom and independence which are requisite to efficient service, is simply to utter an absurdity.—*Judge Harvey R. Keeler. Green Bag.* 25: 148. *March,* 1913.

If elected by popular vote and for short tenure, it is most natural for the judge to be tinctured by the same sentiment in the community that impels the average juror to disregard his duty and quiet his conscience in dealing with the evidence.—*F. D. Mills. Bar Association of Kansas,* 1897. *p.* 52.

The result of the present tendency is seen in the disgraceful exhibitions of men campaigning for the place of state supreme judge and asking votes on the ground that their decisions will have a particular class flavor. —*William H. Taft. Report of the American Bar Association,* 1913. *p.* 423.

In view of this uneasiness one cannot doubt that the abandonment of the policy of electing judges for short terms would contribute greatly to the reëstablishment of the bench in the loyal regard of the American people. —*Charles W. Eliot. Third Annual Report of the Massachusetts Bar Association.* 1913. *p.* 49.

It was shown by Judge O'Brien's testimony that Croker practically determined the complexion and the personnel of the judiciary, and that a Supreme Court judge had to give a full year's salary ($17,500.00) for nomination to his fourteen years' term of office. —*Outlook.* 91: 284. *February* 6, 1909.

The average citizen at the polls has little conception of what lawyer in his community is best fitted for the bench. He has not the fair average qualification to tell what lawyer has the analytical mind, the judicial temperament, the legal learning and proper mental equipment to

best serve his country as a jurist.—*F. D. Mills. Bar Association of Kansas,* 1897. *p.* 52.

In some states of the American union the bench is now and then discredited by the presence of men known to have been elected by the influence of great incorporated companies, or to be under the control of powerful politicians; and there are cities where some lawyers have made a reputation for fixing a jury.—*James Bryce. Modern Democracies. Vol.* 2. *p.* 480.

The causes which have lowered the quality of the state judges are; the smallness of the salaries paid, the limited tenure of office, often for seven years only, and the method of appointment, nominally by popular election, practically by the agency of party wirepullers. The first two causes have prevented the ablest lawyers, the last often prevents the most honorable men, from seeking the post.—*James Bryce. The American Commonwealth. Edition of* 1901. *Vol.* 2, *p.* 636.

I remember in New York under the reign of Boss Tweed to have been taken into one of the courts. An ill-omened looking man, flashily dressed, and rude in demeanour, was sitting behind a table, two men in front were addressing him, the rest of the room was given up to disorder. Had one not been told that he was a judge of the highest court of the city, one might have taken him for a criminal.—*James Bryce. The American Commonwealth, Edition of* 1901. *Vol.* 2. *p.* 637.

In every country of the world, except in the cantons of Switzerland and the United States, judges are appointed and not elected. With us, in the decade between 1845 and 1855, when new constitutions were being adopted in many states, a change was made to the elective system. It was not an improvement. In some states the change was not made. A comparison between the work

of the appointed judges and of the elected judges shows that appointment secures in the long run a higher average of experts for the bench.—*William H. Taft. Popular Government. p.* 190-1.

The papers and periodicals are full to repletion of charges of the inefficiency of the state elective judges, and everywhere one hears about or sees the failure of such courts to enforce the laws of the state. Is there anyone here who has ever heard the charge that any English or Canadian or federal court did not enforce the laws? Nor has anyone heard the charge of inefficiency, impotence, or cowardice against any of the appointed New England state judges whose tenure is their good behavior. —*Merrill Moores. Report of the Seventeenth Annual Meeting of the State Bar Association of Indiana,* 1913. *p.* 58.

To see candidates for judicial honors traveling around their district, whether it be the county or the state, attending meetings and gatherings of a political or semi-political character, having their pictures published in the newspapers, having their cards handed to the voters, having sketches published and generally circulated, in which the statement is made that they will or have gone contrary to the law in respect to certain classes of cases, as for instance that they have not and will not grant non-suits in personal injury cases, is a sight disgusting to all right-thinking men.—*F. T. Post. Proceedings of the Oregon State Bar Association,* 1908-1910. *p.* 93.

A foolish thing was done in this state [New York] when judges were made elective for short terms, but the removal of all real tests of fitness for admission to the practice of the law crowned the folly. The result has been that the corrupt and ignorant judges who mounted the bench under the new system speedily found themselves surrounded by a silent and submissive or collusive

bar, and the two together—the one boldly and defiantly, and the other quietly and sneakingly—went to work to make their fortunes, and turned the people's courts of justice into a kind of shambles, where decisions were sold like meat.—*Nation.* 13 : 365. *December 7,* 1871.

Observe the recent campaign in Cleveland wherein five municipal judges were elected. One candidate for judge traveled with a jazz band and a crew of vaudeville performers—anything to attract public attention to his alleged judicial qualifications, [holding meetings chiefly on street corners. And he was elected!] Others spent weeks jumping from one political meeting to another, rehearsing their family pedigree, telling the story of their lives, their aspirations, and their achievements. Can anyone suppose that out of such a turmoil will come a court composed of judges immune to popular whim? —*Editorial, Cleveland Plain Dealer. November* 21, 1925.

The practice of electing judges by ballot is bad—very bad. It compels judges to engage in the political maelstrom. Very few judges, if any at all, have ever been able to either secure or maintain their positions without paying at least some attention to political affairs. It is to be said with sorrow that many of the judges owe their offices to political bosses or to political organizations to which they pay political debts. Judges elected by the people have been known to demand of their appointees, where judges had political patronage, compensation for appointment, in order, they alleged, that they might pay their political debts. Judges have been known to make appointments of appraisers in estates for political reasons, and to allow them outrageous fees; then demand of such appointees their support in political affairs, and probably a part of the fees that had been allowed such appraisers. Judges have been known to appoint attorneys to represent absent heirs in estates, when it was believed there was no necessity for such appointment, and that it was done

solely to pay political debts.—*Oscar A. Trippet. Proceedings, First Annual Convention California Bar Association,* 1910. *p.* 45.

In the United States the federal judges are appointed by the President with the consent of the senate, and are irremovable except by impeachment. They receive salaries small in proportion to the income which an eminent counsel can earn at the bar, but the dignity of the office makes the best lawyers willing to accept it. In five of the states the judges are appointed by the state governor, in two they are chosen by the state legislature, in all the rest they are elected by the people for terms of various lengths, with salaries varying in amount, but almost always insufficient to attract the highest talent. The result has been to give an excellent federal Supreme Court, a high average of talent in the other federal courts, a good set of judges in the states where appointment rests with the governor or legislature, and in nearly all the other states judges markedly inferior to the leading counsel who practice before them. In some states it is not only learning and ability but also honesty and impartiality that are lacking. The party organizations which nominate candidates for election for the bench can use their influence to reward partisans or to place in power persons whom they intend to use for their own purposes.—*James Bryce. Modern Democracies. Vol.* 2, *p.* 386.

An able lawyer or judge aspires to become a member of the Supreme Court, or Court of Appeals, or in the larger counties, of the Common Pleas Court. He, or his friends for him, hurry about the state or distict seeking out the party leaders in the various localities and soliciting their support in the primary. Posters exhibiting the photographic likeness of the candidates are printed and distributed. Pamphlets setting forth his record, his merits, and often his promises for the future are sent broadcast. Newspaper advertisements are purchased. Train and automobiles are used to transport the candi-

date and his agents and friends about all over the state. Picnics and political gatherings are attended and the candidate meets and shakes hands with "the boys" and expresses gratification at hearing they are "for him." Finally comes the primary. The poor candidate, almost exhausted in body and mind, and sometimes in purse, awaits the result with anxious hope. He is nominated. At once begins a recurrent round of similar activities, except for the fact that now he has a party associate or associates and a party headquarters staff ready to aid him. In three months comes the election. He is now quite worn out. He wins and in two months ascends the bench. This is Ohio's way of taking the judiciary out of politics. How foolish!—*George B. Harris. Proceedings, Ohio State Bar Association,* 1923. *p.* 92.

Judges of the criminal courts today are "placed in office by the underworld element," in the opinion of John W. Houston, chief probation officer of the adult courts, Chicago, as advanced Tuesday, May 25, 1926, to the 300 delegates attending the twentieth annual conference of the National Probation association in Hotel Statler, at Cleveland.

Taking for his subject, "Getting Along with the Courts," Houston detailed for the delegates the shortcomings of the present-day bench as he has found it in his years of work as a pioneer and exponent of probation work, and explained the difficulties placed before probation workers by the very courts with which they are supposed to co-operate.

"Political parties today are too evenly divided," Houston declared. "An outside factor to give a balance of power and majority of votes to one man is needed. It is supplied by the underworld. I am sorry to say that in my own city, Chicago, the fact that a man is indorsed by a large majority of the bar association does not by any means even assure his nomination to say nothing of his election."—*Cleveland News. May* 25, 1926.

NEGATIVE DISCUSSION

ELECTION AND TENURE OF JUDICIAL OFFICERS [1]

This resolution, No. 197, provides for the election of judges by the people by a non-partisan method. The purpose of the resolution is to take the judiciary out of politics; to place it beyond party control or consideration; to make it really an independent branch of the government; incidentally, but of vital importance, to restore to the legal profession its former well deserved prestige, for in the operation of the amendment the selection of the judiciary, in my opinion, will rest with an active, vigilant, honest bar upon whom the people may confidently rely for assistance in making their choice of judges. A judge who receives his commission from the people has higher credentials than one who receives his appointment from executive authority. Certainly in a free commonwealth this is not open to argument.

Under the present system of appointing judges, when a vacancy occurs, and the administration happens to be Republican, the Democratic members of the bar remain still, remain silent, are not in any sense candidates for the vacancy. The candidates are from among the Republican members of the bar. The first effort of the candidates is to secure the support of the party leaders. If they have been particularly prominent in the party, if they have campaigned, if they have stumped, if they have been active in party councils, their chances of securing the appointment are increased in proportion to their services. After the candidates secure political support they turn to

[1] By James E. Maguire. *Debates in the Massachusetts Constitutional Convention*, 1917-1918. Vol. 1, p. 874-80.

the bar to get the endorsement of its members. This is hardly more than a courtesy, a bit of politeness, so to speak. It is simply an action taken to cloud or obscure the vision of the public with reference to the appointment. As a matter of fact, as a matter of common knowledge, in nine cases out of ten the appointment is political.

The same observations are true of the Democratic Party when it is in power. There is no difference between the parties in the methods of making judicial appointments. In one case a Republican is appointed; in the other a Democrat invariably is selected for the vacancy. About five years ago the Democratic Party emerged from a long "Egyptian night." It then elected Governor Foss, and he was succeeded by Governor Walsh. The party had five years of opportunity to make judicial appointments. When making appointments, invariably—and I speak as a Democrat—the main consideration was political. The first question was: "What has he done for the party?" The Republican members of the bar remained quiet. They were not active candidates for the vacancies. They knew it would be useless, that the Democrats would follow the example of their party and appoint partisans to the positions. It is only fair to say that when the number of appointments became so many that it looked a little strong, a little selfish to give them all to the Democratic members of the bar, a few of them were given to Republicans.

Now, I submit that the appointment of judges under party government is generally political. It can hardly be otherwise. Also, the system tends to minimize, if, indeed, it does not humiliate, the legal profession by practically forcing its members to curry the favor of political leaders and party organizations, if they would have their very necessary influence for a judicial appointment. Of the legal profession I need only say that Bryce regards it as the one educated class in the country, and that it has done much for the republic from the beginning. There is no reason why its members should not take a vital, active, commanding interest in the selection of the judiciary.

Under the present appointing system they do not—they cannot. The party in power appoints the members of that party—for services rendered. I say that regardless of whether it is the Democratic Party or the Republican Party. The minority party for the time being has little or no consideration in the matter of making the appointments. They are just as political as they can be—just as political as the selection of a member of the Public Service Commission, or the Gas and Electric Light Commission, or any of the commissions that are under appointment by the governor.

The article of amendment which I have presented is a non-partisan proposition. It provides that the candidates shall have certain qualifications and that their names shall be placed upon the regular ballot in alphabetical order without partisan or other designation except the title of the office. It takes the judiciary entirely out of the game of politics and puts it before the bar and the people where it belongs. I contend that if the bar will be active and vigilant in the selection of the members of the judiciary, that if in any campaign it endorses A for judge because of his superior qualifications over B, the people will elect A. It is preposterous to think that if the bar supports a candidate in a given campaign, for a given judicial office, the people will not second them and approve their choice. The arrangement is almost ideal. A profession jealous of the standing and reputation of its judiciary deliberates on the qualifications of the candidates and submits its opinion to the people who act finally upon them. The tenure of office is for a term of years and mistakes, if any are made, can be corrected in a relatively short time. Contrast that with the present appointing system. There is nothing more humiliating, in my opinion, than to see a member of the bar trailing into a political headquarters—Democratic or Republican makes no difference—nothing more humiliating than holding the coat or the hat of a political leader, so that some time he may be able to get his support for a judicial

appointment. And that is what happens under the appointing system. Think of a man who can bring himself to do such things being made a judge for life! In the legislature, if a member of the house or the senate is very active in railroading matters or helping the governor to get a particular piece of legislation through, and a vacancy in the judiciary occurs, there is a strong probability that he will be appointed. Such cases have occurred. Surely there ought not to be any hesitancy in preferring the non-partisan method of selecting judges to the present political arrangement. And now is an opportune time for the change if the Republican Party, for instance, is about to start on a long period of control of the state. It is unfair to eliminate the minority from consideration in the matter of judicial appointments and yet, by the custom of politics, that is just what will continue to happen unless the change is made.

The first objection that we meet when we propose an elective judiciary in Massachusetts is the fact that John Adams, in the framing of the original Constitution, in the Bill of Rights—in the good old Bill of Rights—Section 29, says:

> It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit. It is therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the judges of the Supreme Judicial Court should hold their offices as long as they behave themselves well; and that they should have honorable salaries ascertained and established by standing laws.

That is very well written, and in a very lofty tone. But twenty years later, when John Adams was President of the United States and about to retire, there were sixteen judges to appoint on the circuit bench of the United States court. What did John do? I am reading from Bryce's *American Commonwealth.* Mr. Bryce's advantage in treating all our governmental matters is that he views them objectively. Mr. Bryce says:

Congress having in 1801, pursuant to a power contained in the Constitution, established sixteen Circuit courts, President Adams, immediately before he quitted office, appointed members of his own party to the justiceships thus created.

Who succeeded John Adams? He was succeeded by Thomas Jefferson, the man who wrote the Declaration of Independence, probably the greatest man among all the early leaders, certainly the man who did more to make this a democratic government, a democratic republic, than any of the others. When Adams acted that way had he in mind his earlier philosophy of 1780 as written in the Bill of Rights, and had he changed his mind? If not, what was his point of view? In the light of his conduct as President of these United States, appointing political followers or political workers, or what not, as judges of the circuit court, we are justified in rejecting his advice in the Bill of Rights because when clothed with high executive functions he discredited his own sentiments. It is perfectly fair to say that when he wrote the Bill of Rights he thought Massachusetts was going to be a federalist state, and that members of his own party, and only members of his own party, were going to be selected for the judicial offices. It is also fair to say that he had no intention of keeping the judiciary out of politics. And as a plain matter of fact he put the judiciary very much in politics. He did not make it independent of the other branches of the government; he made it subordinate to the Executive Department for he placed the appointment of judges under its control.

Having touched on the Federal judiciary—and the Federal judiciary invariably is cited as a fine example of the appointive system—I shall call attention to what Bryce says of the legal tender cases, when the court was packed by no less a man than President Grant:

In 1866, when Congress was in fierce antagonism to President Johnson, and desired to prevent him from appointing any judges, it reduced the number, which was then ten, by a statute providing that no vacancy should be filled up until the number was

reduced to seven. In 1869, when Johnson had been succeeded by Grant, the number was raised to nine, and presently the altered court allowed the question of the validity of the Legal Tender act, just before determined, to be reopened. This method is plainly susceptible of further and possibly dangerous application. Suppose a Congress and President bent on doing something which the Supreme Court deems contrary to the Constitution. They pass a statute. A case arises under it. The court on the hearing of the case unanimously declares the statute to be null, as being beyond the powers of Congress. Congress forthwith passes and the President signs another statute more than doubling the number of the justices. The President appoints to the new justiceships men who are pledged to hold the former statute constitutional. The Senate confirms his appointments. Another case raising the validity of the disputed statute is brought up to the court. The new justices outvote the old ones; the statute is held valid; the security provided for the protection of the Constitution is gone like a morning mist.

That the appointed Federal judiciary is not entitled to any halo is further shown in the *Tilden vs. Hayes* contest when a number of them were appointed on the electoral commission. They voted on who should be President according to their political bias rather than in a judicial manner. Since then we have been mortified to see the income tax declared unconstitutional by one of the justices changing his vote from yes to no.

Another argument, or shall I say obstacle, we have to meet when we propose an elective judiciary is what Rufus Choate had to say in the Convention of 1853 in favor of the appointive method. Inasmuch as Mr. Choate will be quoted here, and what he had to say urged as a reason for the continuance of the appointive system I think it well to read what some of his colleagues had to say in favor of the election of judges by the people. Their position seems sounder than his. They have more faith in the people. They answer him sufficiently. I read from them:

Mr. Wood of Middleborough:

Now, if it is proper for the people to keep the power in their own hands, then the only way in which that can be done is to provide for the election of these officers by the people, as we provide for the election of all other officers. If it is not proper

that the people should retain this power, it must be on account of one of two reasons—either, first, that the people at some time may not be desirous of electing proper officers; or else, secondly, because they have not sufficient intelligence to make a proper selection.

In regard to the first of these reasons which may be adduced, namely, that the people may at some time become so corrupt, or take so little interest in the matter, that they will not care whether proper persons shall be elected or not, no one, I presume, will undertake to sustain such a position for a moment. They are interested in this matter above all others. They are the only parties who are interested, for any one of us may be under the necessity of falling back upon the judiciary for the protection of our interests and our liberty. The whole people, then, are interested; and it cannot be otherwise than that they must always be anxious to keep the bench filled with honest and upright and learned and independent judges.

Mr. Hooper of Fall River:

It is admitted,—because it has been demonstrated in other States,—that the people of other States are fully competent to perform this duty, and surely no one will place the people of Massachusetts in an inferior position to the people of any State in the Union, in regard to intelligence and capability of self-government. Why, then, should they be denied the exercise of this right?

Mr. Holder of Lynn:

It has been said that the election of the judges by the people would destroy their independence, and make them subservient to political parties. I beg leave to differ from gentlemen who take that view of the subject. I believe it will clothe them with a true and god-like independence, based upon the popular will of the people. That, sir, is always true and unerring, and should always be regarded by all men who are in authority. I would ask gentlemen of the Convention if they wish to give the judge a salary and continue to guarantee it to any class of individuals who shall not be chosen by the people, and who are not popular with the people?

Mr. French of Beverly:

I do not see why a judge appointed by the Governor would not be as liable to be led astray by political prepossessions as a judge elected by the people. I am for retaining in the hands of the people all the power that belongs to them. Power, it is said, is always stealing from the many to the few; and that power which belongs to the people, I want them to hold.

Mr. Keyes of Dedham:

They tell us that the people cannot be trusted with the powers necessary for their own safety and their own salvation, and we shall virtually acknowledge it if we refuse to adopt the amendment. I believe, if there are any officers whose election can be safely intrusted to the people, they are the judges. I regard it to be so on the ground that the office of judge is one in which all the people are interested, and the integrity and respectability of those who are to occupy that office is near and dear to the hearts of all the people. Because the people are liable, in some degree, to feel their power and to be affected by their decisions, they will exercise a criticism and judgment in their selection that are not exercised in regard to any other class of public men.

Mr. Butler of Lowell:

The whole argument which was put by my friend from Manchester (Mr. Dana) appeared to me to proceed upon an entirely wrong basis,—upon a distrust of the people. And that was the case with the ingenious argument of the gentleman from Cambridge (Mr. Greenleaf) who, with the tact of an old lawyer, and the artistic finish of the profession, says: "Why, why do you wish to make the judges elective?. The people elect them now. They elect the Governor and the Governor elects the judges, and what more would you do?"

I say I think both the gentlemen have proceeded upon a wrong assumption. One fairly puts the argument that he distrusts the people, that he distrusts popular influence, an argument which proceeds upon the ground that very bad influence comes from the people, and every good influence from conservatism; it seems to put the argument upon the ground that the judges are only to be influenced by corporate wealth and power. If they can be rendered independent of the people, they say, it is well enough; but if you bring them within the influence of the people, they will be wrong.

The citations I have read answer, I think, Rufus Choate. They are from men, as we look back, who seemed earnest and red-blooded, men who had confidence in the people. Notwithstanding all the glittering and appealing generalities of Mr. Choate in his remarks, I submit that the confidence of these men, these old leaders, in the people, the feeling that the people can be trusted, is a much better argument, a much safer position and more to their glory than the sentiments and the attitude taken by Dana and Greenleaf and Choate and some of the others.

When this matter was discussed before the Committee on Judiciary a number of the members of the convention appeared in favor of the different resolutions. Conspicuous among those who opposed an elective judiciary was an attorney who very frankly and very bravely said that he represented the Boston Elevated Railway Company, and who also said that he spoke for himself. I asked him why his corporation, above all the corporations in the commonwealth, felt it necessary to appear before the Judiciary Committee in opposition to these measures. He answered that his corporation at one time was a party to about 60 per cent of the cases in Suffolk County; the figure later fell down to 50 and now he thinks it is 40 per cent. That appeared to him sufficient reason why he should come before the committee in opposition to the elective system over the appointive method.

My next question was: "Does your corporation under the present system take any active interest in the selection of judges?" He said that as a corporation there was no active interest in the selection of judges. I asked: "Do you as individuals take any active part in the selection of judges?" He hesitated, but finally admitted that he had signed a petition of endorsement of candidates for judicial appointments, but he did not like the practice. Now, I know of my own knowledge that at least one other member of his legal firm has endorsed candidates for judgeships, and I know that in the case of a district judge the man who had his endorsement was successful. I do not say that he is a poor judge, or that he is an indifferent judge, or that he is unfaithful; I simply assert the influence that secured his appointment.

The point that I wish to establish and to drive home is that the corporations are taking an active interest under the present system of selecting the judiciary. They do not expect a given judge to decide a given case, perhaps, in their favor; all they hope for is that a judge shall have a certain mental attitude on property and individual and

other rights—and brought up in a particular environment he is very apt to have a corresponding mental list; given that, they are perfectly satisfied to rest there. So naturally they object to the elective system, for under it the people will have more to say about the judiciary; those selected to be judges will be certain to have a freer mental attitude on the questions that come before them.

I may say here that the attorney I have mentioned had no effect on, or influence with, the committee. I simply am bringing in the fact that the corporation was represented, to give the Committee of the Whole an opportunity to know its attitude on this question. No other corporation felt it was necessary to come before the committee and argue the matter. However, the attorney was not very happy in some of his arguments. At one time he would find fault with the jury system; at another time he would complain of the judges, their failure to set aside cases that he felt ought to be set aside. Again, he did not think the bar could be relied upon to take an active, vigilant interest in the selection of judges if this non-partisan elective method were adopted. His arguments were so inconsistent that I am obliged to say that he must have thought we were a different jury every time he spoke before us. When I noted his different attitudes to him, he was a little embarassed.

ELECTION OF ALL FEDERAL JUDGES

The nine judges constituting the Supreme Court are appointed for life. They are placed in this position of power, not by vote of the people, but through presidential appointments. Chief Justice Taft was elevated to this position by presidential appointment after he had been repudiated by the people on his record as President. The people refused overwhelmingly to reelect him after studying his acts and his sympathies on public questions. No

[1] From *The Facts; La Follette-Wheeler Campaign Text-Book.* p. 90-1.

one will contend that by vote of the people Chief Justice Taft could have been elected to this powerful office for life, but through a presidential appointment it was possible for him to write the opinion which nullified the *Child Labor Law*.

The entire array of inferior Federal judges share the sovereign power of the Supreme Court. Some of them have shown themselves to be petty tyrants and arrogant despots. Even if all these judges were wise, broad-visioned men we would still have only a benevolent despotism. It is not the personalities which are objectionable primarily, but it is the system under which their power has been permitted to grow.

We have clothed our judges with the prerogatives of royalty. While in England the judges have largely been stripped of their original powers, in this country the old conception of divine right of judges remains.

The selection of judges has been left largely in the hands of lawyers. The majority of lawyers, in their turn, are employees of wealthy men and large corporations. The bar association, controlled by a handful of leaders, often selects the Federal judges in a state. Almost without exception the men who control these appointments are lawyers retained by great corporations. Their main function is to protect these corporations in their special privileges and powers to exact tribute from the public. These men seldom appear in court but spend their time devising ways and means to circumvent the laws for their clients, or to have them declared unconstitutional by the very judges whom they have helped to select and place in power. Such judges will naturally grant injunctions against labor organizations. They will be disposed to declare laws unconstitutional which are against *their* interests.

The only remedy is for the people to take the selection of the Federal judiciary into their own hands. Punishment by repudiation at the polls should be the penalty

for those who demonstrate a hostile attitude toward popular rights. The remedy is to make the judges responsible to the people.

In the solemn words of Abraham Lincoln: "The people of these United States are the rightful masters of both the Congress and the courts, not to overthrow the Constitution but to overthrow the men who pervert the Constitution."

DEFENSE OF THE ELECTIVE JUDICIARY [1]

The advocates of an appointive judiciary direct our attention to what they describe as "the one feature distinguishing the judicial system of our state from that of every other civilized Caucasian nation, namely, the selection of judges at general elections, to serve for short terms," rather than by a "qualified appointing officer or board, with a tenure during good behavior and usually a pension on retirement."

In these terms we find a statement of both cause and cure for the alleged inefficiency of our state governments in the administration of justice.

This statement is contrary to the ordinary conception of democracy in governmental affairs. In the current view, democracy consists in the direct, immediate and constant participation of the individual citizen in the selection of the persons who occupy the offices of government. In the matter of judges at least, we are told, democracy is a failure.

The familiar saying that "the cure for the evils of democracy is more democracy" finds no acceptance among the advocates of the appointive system. In their view the cure for the errors of public judgment lies in recourse to the infallibility of private opinion and personal preference. There is wisdom in numbers—provided the numbers be small and carefully selected!

[1] By Walter Macarthur. *Transactions of the Commonwealth Club of California.* 9: 320-8. June, 1914.

The proposal to change the method of selecting judges is predicated upon the "complicated and highly specialized duties of the courtroom," a condition, in turn, arising from the increasingly complex character of industry. Judges are called upon to decide issues involving questions of the most intricate technical nature. Up to this point there is an agreement, as to certain particulars, between the proponents and the opponents of the appointive system.

Objections Stated

First, it is agreed that we cannot hope to secure as judges men personally expert in all the issues presented in court; secondly, no mere simplification of procedure can obviate the need of expert judgment; thirdly, the increasing complexity of the "duties of the courtroom" creates a corresponding demand for men of large mind and powerful intellectual grasp.

These are matters concernings which there is little or no room for dispute. It does not follow, however, that the remedy proposed will relieve the situation.

In effect, we are told that the present method of selecting judges is inefficient because of the changed character of litigation; that the present method is an elective one; consequently, the remedy lies in changing the method from election to appointment. The argument, as thus stated, has the merit of simplicity, but is is inconclusive for the reason that it savors of change for change sake.

It has been well said that simplicity is the essence of all greatness. If simplicity were in itself an assurance of merit we might safely accept as final the judgment that the remedy for the defects of our judicial system consists solely, or at any rate primarily, in a change from the elective to the appointive system.

Unfortunately, the case is not so simple at it may appear. The argument presented in favor of the appointive

system of itself proves the difficulty rather than the simplicity of the problem.

In the first place, we are told that much of the trouble in dealing with questions of this kind lies in "the American practice of attempting a cure by directory legislation, rather than the perfection of the administration of the governmental function complained of." It would seem that the proponents of the appointive system have fallen into the very error which they deprecate.

If the term "directory legislation" may be construed to imply effort aimed directly at a given object, it would seem that the method proposed in the present instance comes well within that definition. We respectfully submit that the proposal under discussion falls somewhat short of our conception of the "perfection of administration."

In the other instances cited in favor of the proposed change we note the assumption that the successful administration of affairs by appointed officials proves the soundness of the view in favor of an appointive judiciary. An examination of these instances shows that in some respects they prove too much, in others not enough.

Appointed Judge

Reference is made to certain instances in which judges appointed by different governors have proved highly satisfactory, so much so that they have since been elected and re-elected, so that now "their position is practically one of life tenure." The significance of these cases lies in the last mentioned particular. Although appointed in the first instance, these judges are in reality a product of the elective system.

In making an appoinment to the bench the governor is bound to consider the views of the public. The appointee himself, although owing his office originally to the appointing power is bound to conduct himself in deference to public opinion if he would retain his position. The

fact that the choice of the governor has been confirmed by the voters is in itself a refutation of the charge that the voters are unable to discriminate in the selection of judges. On the whole, these instances are to be credited to the elective, rather than to the appointive system.

Of course, it may be said that in these instances the public choice was pre-determined by the character of the appointment originally made; that the public have merely confirmed a choice previously made for them, a choice in making which they might have been less fortunate had it been left to themselves in the first instance.

The weight of this contention can only be determined by a comparison in general between the character and services of judges selected by both methods. Such comparison must, in the nature of things, be largely speculative, according to individual predilections. It is undisputable, however, that in the case of efficient judges who have originally been appointed and afterward elected, the credit in the long run lies with the elective system.

To say that in certain instances these judges, being members of the political party largely predominant in their district, were free from the fear of defeat—in other words, were certain of confirmation by the voters—does not affect the elective principle. The meaning, if any, to be derived from this statement is that partisanship in the selection of judges in certain circumstances prove to be a good thing.

Thus the proponents of the appointive system may be quoted against themselves. It happens, however, that no particular significance is to be attached to the political phase of the instances referred to.

Politics Not Important

If there be one thing that is clearly demonstrated, not only by theory or speculation, but by actual experience in the election of judges, it is that party politics counts for little in this particular. We need but reflect for a

moment upon the facts concerning the political associations of the judges in this locality to observe that these associations have had little or nothing to do with their election. It is not supposable that this city differs in this respect from the average community.

It appears, then, that even under a system of partisan nomination and election the selection of judges depends not upon the preference of the voters for a particular party, but upon the confidence of the public in the probity of the judge himself.

In matters affecting his personal welfare, as distinguished from his public interests, the voter is disposed to subordinate his political convictions to his sense of personal safety. Hence it is that judges are quite commonly, in fact uniformly, elected without reference to their attitude upon political matters.

It is said that judges in this locality, although no longer dependent upon any political party, are still subject to a "form of political activity just as detrimental, if not more so." Reference is here made to the fact, assuming it to be a fact, that some judges participate more or less actively in the work of fraternal and social organizations, while others secure a great deal of publicity from the press reports of their cases.

The Question of Advertising

The difference conveyed by this statement is that the judges in question act in these conditions with the ulterior object of advertising themselves, and thus making up for the loss sustained by the fact that they no longer are assured the support of a political party organization.

We cannot accept this inference without qualification. We think it quite within the bounds of probability that a judge may act in such matters without selfish motive, and that whatever strength he may derive in this way may be the natural outcome of legitimate association with his fellows. At any rate, we cannot agree

with the inference that such activities are in themselves derogatory of the dignity with which a judge should bear himself in all the relations of life.

To say that the judge loses by the change from the partisan to the non-partisan system of election, is to say that the partisan system should be re-established, rather than that we should adopt a system which, while removing the judge from all open contact with the public, would place him under the stronger obligation to the appointing power.

Whatever may be said for or against the forms of political activity here referred to, it remains to be said that many, probably a large majority, of the judges in this locality are not subject to criticism on the score of undue or questionable activity. On the contrary, these judges are distinguished as much by the rectitude of their private life as by their ability and probity on the bench. These men, at any rate, do not owe their re-election term after term to any conduct that can, even from the strictest viewpoint, be considered questionable.

Against every instance of questionable conduct on the part of a judge may be cited many instances, equally well known, of judges who in private and public life bear themselves in conformity with the highest standards of personal conduct.

Courts and Commissions

The proponents of the appointive system point to what they believe to be an analogy between the courts and the commissions now appointed by the governor. We are unable to perceive any similarly, except in form, between these branches of the government.

The functions of the Railroad Commission, Industrial Accident Board, and other bodies of the kind are administrative, rather than judicial. These bodies are composed in the main of laymen, who may or may not

be versed in the law. The members of these bodies occupy a position similar to that of a court commissioner. Here the analogy ends.

It may well be that the appointive system is efficient for all the purposes of a body whose function is limited to determining the proper rate of transportation between given points, or the proper amount of compensation due an injured workman.

The questions adjudicated by these bodies are in their nature economic, rather than judicial. The relation of these bodies to the public is of a nature different from that of the judge. It does not follow that the system which is efficient in the selection of a railroad commissioner would prove equally efficient in the selection of a judge. On the contrary, the requirements which commend the appointive system in one case may, and we believe do, preclude it in the other case.

The suggestion that judges should be appointed rests partly upon an assumed difference in essence between the judicial and other branches of the government, and partly upon an assumed likeness between the functions of the judge and those of certain other officials now appointed. As to the latter assumption, we have already stated what we conceive to be the error upon which it is based.

We can only add that the appointive system is of too recent origin to afford a basis of comparison in connection with the manner of selecting judges.

Powers of the Judge

Concerning the assumption of difference between the judiciary and other branches of the government, we believe that the difference, if any such exist, is so much reason in support of, rather than in opposition to the elective system.

The judge, more perhaps than any other official of the government, is vested with power to vitally affect the

property, the happiness, and indeed the life of the citizen. Ours is a government of law. Under such a government the official who interprets the law occupies a position of supreme importance and wields the power of final arbiter between one citizen and another, and between the individual citizen and the nation itself.

Property rights and family duties are alike subject to his judgment. From his mouth issues the law of the living and the will of the dead. To him the humblest citizen looks for the protection of his rights, whether of person or of property, as against any possible combination of his enemies. The hand of the nation itself, when wrongfully raised against a single man, woman, or child. is stayed by the voice of the law.

It would seem that the judge alone, even if all other officials be selected by process of appointment, should be chosen directly by the people. We may admit that under the elective system unworthy men have been called to the bench. We admit that such mistakes will be repeated as long as the elective system prevails. This, however, is merely an admission of the fallibility of human judgment. It must also be admitted that even the appointed judge has been proven fallible upon more than one occasion.

Judging Qualifications

Can the proponents of the appointive system claim infallibility in the "qualified appointing officer or board?" Of course, no such claim is made. All that is claimed is that by reducing the numbers entrusted with the responsibility for the appointment of judges the liability to err will be proportionately diminished.

It is claimed that the judgment of a few men having intimate knowledge of a candidate's character is likely to be better than that of many having only a general knowledge.

With this claim we take issue. We believe that the judgment of the people is more likely to be correct than

that of a few men, however carefully they may be selected.

We do not deny that under the appointive system, where such exists, the general character of the bench is high and its general conduct satisfactory. Neither can it be denied that there are numerous exceptions to this rule. We believe on the whole, that in such instances the character of the judge is good, not because he is appointed, but because the law which he administers is good and because his surroundings are conducive to good conduct.

The unsatisfactory condition of court procedure seems to be generally admitted. It may be that reform in this particular would not accomplish all that is desired. It would seem, however, that here lies the first step toward the hoped-for goal. It cannot be expected that a judge, however wisely selected and however proficient in his duties, can overcome the difficulties and disadvantages arising from a system of court practice that seems to have been devised for the purpose of prolonging, rather than of expediting legislation.

Majority or Minority Selection

The theory of an appointive judiciary, as we understand it, is that the judgment of a small number of men is better than that of a large number; that the people are unable to govern themselves, at least in the matter of selecting their judges, and that a judge in order to be trusted by the people, must be kept as far away from them as possible.

We disagree with this theory. The remedy is worse than the disease. Judges appointed in accordance with theory would be more, rather than less dependent upon the favor of others. The degree of their dependence would be great in proportion as the numbers to whom they owe their appointment are small.

We do not suggest that "the people are too stupid in governmental matters to pick the best system." On the contrary, we gladly join with the proponents of the appointive system in expressing the fullest confidence in the "sound common sense of the American public."

We disagree only as to the merits of the proposed system. It still remains to be proved that that system is the best. Until this proof shall be produced, we feel that we may venture to predict the rejection of the appointive system without at the same time raising any question as to the "sound common sense of the American public."

Influence of the Recall

With reference to the suggestion that the objections to the appointive system may be overcome by the application of the recall, we would direct attention to the fact that the recall, as applied to the judiciary, was adopted chiefly upon the ground that the people, being acknowledged capable of electing judges in the first instance, could not very well be denied the ability to judge their conduct in a recall proceeding.

We are free to acknowledge that we cannot see much help for the situation now confronting us in the suggestion that the people are unable to select their judges in the first instance, yet are quite capable of correcting the errors of the appointive power. The recall is consistent only with the elective system.

The statement that the recall should be retained under the appointive system is denial of the main ground upon which that system is proposed, namely, the inability of the people to select their judges. The recall should be maintained, not, however, as an illogical check upon the appointive system, but as a logical and necessary feature of the elective system.

The admission that the recall might be needed in the case of a judge who should prove "grossly offensive" or "grossly incompetent" is an admission that the "compe-

tent man" who, we are told, "will make the necessary investigations to discover the proper persons to sit on the bench," may prove to be just as human as the average citizen, and just as likely to err in the search for "proper judicial material."

Men long ago learned that it is not necessary to burn a house in order to roast a pig. Why destroy a great principle in order to secure a reform in the administration of justice? It would seem that something is due in this connection from the members of the legal profession. Reform, like charity, should begin at home.

Efficiency in the interpretation of the law is not entirely a matter of power on the part of the judge to tell the lawyer what to do and make him do it. The essence of efficiency is the determination of issues in a manner consistent with public and private rights. The best assurance that these rights shall at all times and in all circumstances be respected lies in the maintenance of direct connection between the citizen and the judge.

Capacity of the People

The issue between the elective and the appointive system of selecting judges is but a form of the ever-existing struggle between those who believe in government by the people and those who believe in government of the people, between those who believe that the people are capable of governing themselves and these who believe that the people are capable only of selecting others to govern them.

The substitution of the appointive for the elective system in certain instances does not signify a "democratic revolution." The tendency in this direction may be progressive, in the judgment of those who understand that term, but it is certainly not a democratic tendency.

We readily concede that as to some functions of government the appointive system is to be preferred. But the very reasons for this preference operate to exclude

the judiciary from the appointive system. If we say that a certain official may be appointed because his functions are administrative, we may also say that a judge should not be appointed because his functions are not administrative but judicial.

If there be a single reason in favor of the election of any official that reason will be found to apply with greater force in the case of the judge than in the case of any other official.

The judge embodies the powers of government more immediately and more completely than does the occupant of any other representative office. His judgments are the interpretation of the people's will. That will, be it wise or unwise, strong or feeble, is the soul of free government.

If free government is to endure in substance as well as in form the people must preserve in their own hands the power and the responsibility of naming the officials who interpret the will and hold the scales in which the deeds of men are weighed.

ELECT THE JUDGES [1]

What is the history and the theory of the appointment of judges for life in this commonwealth? The theory of the appointment of judges for life which we have in our state comes down from the English system, where it had been invoked because prior to this system the judges were subject to the pleasure of the King alone, and it was found that under such a system the judges were doing what the King wanted, because they were afraid of incurring his displeasure. Then it was that there was written into the commission of judges the principle that their tenure should be made *"quamdiu se bene gesserint"*—"during good behavior"—in contradistinction to the custom that had prevailed before that by which judges held office during the pleasure of the King.

[1] By Joseph F. O'Connell. *Debates in the Massachusetts Constitutional Convention,* 1917-1918. Vol. 2, p. 972-80. Reprinted in *Massachusetts Law Quarterly.* 3: 291-7. May, 1918.

The English Parliament made the distinction for the protection of the people. It was done to protect the people and to keep the judges near the people, to assure the people that the judges would act for them in the protection of their rights as against the King or his friends in the government. This new doctrine at that time was not invoked for the purpose of making judges independent of the people, but to make the judges independent only to such a degree that they would not yield to might as against right. It never was intended that the judges were to be independent of the people.

It is almost an elementary proposition in our republican form of government that the judicial department of the state shall be separate from, and independent of, legislative and executive powers. All students of our form of government delight in reaffirming this doctrine, and gentlemen have arisen in the convention, in discussing proposed amendments, and they frequently have reminded us that we have the three familiar "checks and balances" in our form of government—the judiciary balances the executive and legislative, and the legislative serves as a check upon the executive and the judiciary, and so on—every one of the three balancing and checking the other so that we have a perfect equilibrium.

Yet while this may be the theory of our system, what have we as a matter of fact? Is not our judiciary absolutely dependent upon the favor of the governor for appointment? Where is the independence of the branches when you start with such an administration? Where is the separation at that time? Rather is there not a direct and undeniable connection between the executive and the judiciary?

Under our system one man, a governor elected for one year and responsible only during that time, can bring together secretly five members of his council and appoint a man, and with the aid of his five friends in the council have him confirmed, and that man must be kept in office

for life or as long as he does not commit some scandalous wrong, no matter how inefficient or weak he may be. He must be kept in that office and the people cannot be rid of an unsatisfactory judge, whether it is in the highest or the lowest court, so long as that man so conducts himself that he does not himself bring down the censure of the people at large because of gross misconduct. His weakness in the office and his inability to perform the high duties always will be excused in one way or another, and in the absence of widest public indignation it is practically impossible to free the judiciary from such a judge. Do you gentlemen think that such a state of affairs ever was contemplated or intended when this feature was written into the Constitution in 1780? It does not seem so to me, and can any gentleman in this convention, with this in mind, deliberately go forward and make it even more difficult for the people to rid themselves of inefficient officials?

Again I repeat, if the initiative and referendum has any logic to invoke its application, then there can be no logic in excluding the judiciary from its scope and operation. Members ask: "How is it possible that Massachusetts could have written such a doctrine into its Constitution?" Personally there is one reason that satisfies me. At the Convention of 1780 all the judges in the Colony of Massachusetts Bay were delegates to the convention, and they were very prominent in its affairs. They, of course, were holding office for life under the English system which then was prevailing, and besides there were in the convention a great number of professional men, ministers and doctors. The real strong men, the farmers, the mechanics, the merchants and the fishermen, were at the front with Washington or in attendance at the Continental Congress sitting in Philadelphia. The original draft of the Constitution was drawn by John Adams, who had been appointed Chief Justice shortly before the

Constitution was drafted, although, as a matter of fact, he never sat.

Under these influences and this leadership it is not at all strange that these gentlemen, although they talked about the separation of the departments of state, yet could find themselves adopting an extreme exception to the doctrine itself, in so far as it pertained to themselves. According to Chief Justice Shaw, it was adopted only as an experiment; and although Massachusetts wrote the first constitution, she is the only state in this republic today that has this all-important and anomalous situation which violates one of the fundamental principles of our government.

Thus we are confronted with a contradiction of the axiom of government in this country that the people are the source of all political power, and that to them should their officers and rulers be responsible for the faithful performance and discharge of their duties. While the people are permitted to elect their officials for the executive and legislative branches of our government, they are wholly deprived of it as far as the judiciary is concerned. The important and almost sacred privilege of choosing men who shall sit in judgment upon the lives, liberty and rights of property is denied to the people of this state, thereby violating the fundamental principle of our government by the people.

Our judicial power should be a distinct and coequal department and should be wholly independent of the executive and legislative. It never should be dependent upon executive whim or caprice or prejudice. If the people of Massachusetts who accepted our first Constitution could have forseen how well the forty-two states of this union that elect their judges are guided and how well the law is enforced, does any man in this convention think they ever would have permitted the doctrine of an appointive judiciary for life to have been foisted upon them? I for one never will believe that they would have.

Oh, but some members may say, true, our system is not like the other states, but it is like the Federal system. I must differ with these gentlemen and call their attention to the fact that our system is radically different. Under the Federal system a man is appointed by the President, it is true, but he must be confirmed by a majority of the United States Senate. This means that each of the senators from the forty-eight states in the union, who themselves are responsible to the people, has something to say as to whether or not the appointment shall be confirmed. Here only five men, in secret session, can confirm the appointment; but under the Federal system ninety-six senators sit in open sessions, and only after searching investigations and hearings are men confirmed to judicial positions.

Every one of us is familiar with the careful, thorough and painstaking manner in which the United States Senate investigated the qualifications of Mr. Justice Brandeis before he was confirmed. Compare that, if you will, with the appointment very recently of a judge to our Superior Court who is not known to ten men in this convention. What influences brought about his appointment? He may turn out to be a good judge or an unsatisfactory one. If he is good, it is a pure accident as far as the people are concerned or as far as they are informed. If he is unsatisfactory there will be no way of getting rid of him. Do you gentlemen, in this year of grace, believe that such a system as ours is either scientific or appropriate or necessary? Why should there be any secrecy or hidden practices or unfamiliar methods about the appointment of judges? Is it to insure such practices that the gentleman from Fall River wishes to have the present system made more impregnable, and does this serve to convince men in this convention that they should vote to except the judiciary from the provisions of the initiative and referendum?

Let me impress upon the members of this convention

that no other state in the union has such a system as we have. We appoint in Massachusetts for life. No other state in the union follows us today, although we adopted the first constitution and were the model of the constitutions of all other states. Some of them did follow us, it is true, but in each and every case they have abandoned the doctrine of appointing judges for life. New Hampshire comes the nearest to us, where judges are appointed until they are seventy years of age. Even New Hampshire could not stand for the doctrine of having men enfeebled by age or sickness enforced upon them after the age of seventy. We make no provisions that are certain to insure us from the infirmities of age or disease.

Let me give the list of the states in this union, as quickly and as briefly as I may, where judges are elected:

Alabama.
Arizona.
Arkansas.
California.
Colorado.
Georgia.
Idaho.
Illinois.
Indiana.
Iowa.
Kansas.
Kentucky.
Louisiana.
Maryland.
Michigan.
Minnesota.
Mississippi.
Missouri.
Montana.
Nebraska.
Nevada.
New Mexico.
New York.
North Carolina.
North Dakota.
Ohio.
Oklahoma.
Oregon.
Pennsylvania.
South Dakota.
Tennessee.
Texas.
Utah.
Washington.
West Virginia.
Wisconsin.
Wyoming.

In the following states many of the judges are elected by the people.

Connecticut.
Florida.
Maine.
South Carolina.
Vermont.

In other words, forty-two of the states in the union have adopted the doctrine of electing their judges.

In the following states the judges are selected by the legislature for a limited tenure:

Connecticut.
Rhode Island.
South Carolina.
Vermont.
Virginia.

The only states in the union where appointment by the governor exists outside of Massachusetts are:

Delaware.	New Hampshire
Maine.	New Jersey.

and in these states the appointment is for a limited number of years, as follows: Delaware, where the appointment is for twelve years; Maine, where it is for seven years; New Jersey, where it is for seven years; and New Hampshire, where the appointment lasts until the appointee has reached the age of seventy years.

In other words, in every state in the union, outside of New Hampshire and Massachusetts, the tenure of all judges is for a limited number of years, whether they are elected by the people or appointed by the governor or selected by the legislature, and who is there bold enough in this convention to say that the people in the other forty-six states of this union are not a law-abiding people or that justice is not ably administered through their courts? It must be remembered also that these states comprise all sections of this country, with the great diversity of interests which the various states present.

Let us not forget also that many of the original thirteen states which followed our system shortly abandoned the system of appointing judges for life, notably the great commonwealth of Pennsylvania and the great empire state of New York, the two leading states of this union, both of which found that the appointive system was very bad in practice. Since New York changed in 1847 and Pennsylvania in 1853, there has been no desire for change in either of those states. In fact there is no state in the union which had an appointive system and then changed to an elective system, which ever has thought seriously of returning to the appointive system. the great empire state of New York held a Constitutional Convention two years ago which was presided over by Elihu Root, accepted as the leading member of

the American Bar. The chairman of the Judiciary Committee in that convention was George W. Wickersham, a former Attorney-General of the United States under President Taft, and the committee itself was composed of great lawyers. I have talked with many of the members of the Judiciary Committee of that convention, and they all told me there was no demand for a change from their elective system, and some of them went so far as to say that no lawyer in New York even cared to suggest changing the system by giving back to the governor the power of appointing judges. Every lawyer of experience knows that the New York Court of Appeals, which is their highest court of appellate jurisdiction and which has no original jurisdiction, has in its membership men of exceptional ability and character, and they are all chosen by the people. Will men in this convention believe that great public figures like Elihu Root, George W. Wickersham, Edgar T. Brackett, Joseph H. Choate, and other great leaders of the American and New York bar, would not have engaged actively in any movement that would help to better their courts, if they had felt that by changing from the elective to the appointive system they could accomplish any improvement?

Let it not be forgotten that of all the great states of the union which have held constitutional conventions in late years, not one of them has thought seriously of going back to the system of appointing judges. Does not that convince you gentlemen here in Massachusetts that wherever the people have a chance to elect their judges, they are perfectly satisfied with that method, and that they would not give it up? The net result, all over the union, of the elective or appointive system for a tenure of years has been that good judges almost invariably have been reelected and reappointed, whereas likewise weak or bad judges have failed invariably of reelection or reappointment, with the result that the people in these

other states possess a judiciary that always does its very best, knowing that it is responsible to the people, and that the people will not tolerate a weak, inefficient, vicious, or tyrannical judiciary.

Are you men in this convention at this time going to say to the rest of this great union that they have not law-abiding citizens, honorable judges and wise men whose decisions represent the best that can be obtained? Pick up your last recent law reports, you lawyers here who follow the advance sheets, and see how many times the decisions in those states in which judges are elected are cited as precedents to justify our courts in decisions sent down to us. Then go to the reports of other states in the union and pick up the advance sheets and find out how seldom Massachusetts is now followed, and you will be surprised to learn that the states in which judges are elected are followed as authorities far oftener than Massachusetts, where our judges are appointed. Glance, if you will, at the United States reports for the last ten or fifteen years, and tell me if you are not surprised at the very few instances in which the decisions in this state are cited now as authority, and confess to me also that you are surprised at the great number of citations from the other states of the union, that the Supreme Court of the United States sends forth to the world as authorities in law, which justify our august court in its final decisions.

Oh, but some people say: "Politics would come into the courts." Well, if they can bring any more politics into the election of judges than is already in vogue here in Massachusetts in the appointment of our judges, I should like to know just what kind of politics it possibly would be. I cannot conceive of it being any worse. Here we have a system of appointments that is based on secret, hidden, unseen, political maneuvring. The appointments to our judiciary from the very beginning have been reflections upon the people of this commonwealth in the

manner in which they have been obtained. It is true we have had many good judges, but this has been due more to the integrity of the men who have been appointed than to any merit of the system by which they have been appointed.

At the Convention in 1853, Henry Wilson, then Vice-President of the United States, from the commonwealth of Massachusetts, said that from 1780 down to that day, 1853, only two men had been appointed to the courts in Massachusetts who were not Federalists, and violent Federalists at that. He ridiculed the idea that politics was not considered in the appointment of our judges, and pointed out that the first consideration was whether or not a man was acceptable to the leaders of the Federalist Party. From the beginning of the commonwealth down to the days of Governor Foss (1911) no Irish Catholic ever was appointed on our Supreme Judicial Court because of the secret religious cabal that always surrounded that office whenever judicial appointments were to be considered, and which always succeeded in preventing the consideration of any Irish Catholic member of the bar, no matter how well qualified he might be. Up to twenty years ago no Irish Catholic ever sat on our Superior bench, and since that time down to the days of Governor Foss only one at a time (and totaling but four in all) was permitted. If it had not been for the splendid courage of Governor Foss who broke all precedent and cast the judgment of these intriguers aside by appointing a Roman Catholic of Irish extraction to the Supreme Judicial Court, and by appointing several of the same kind to the Superior Court, all of whom have given eminent satisfaction, I tell you gentlemen here today that the people of the commonwealth of Massachusetts would be so aroused that an elective judiciary would be their fondest hope and their greatest achievement. It would be absolutely impossible for this convention to leave here without adopting a resolution for an elective

judiciary, and it would be accepted by an enormous majority at the polls.

What system really prevails as to appointing judges here in Massachusetts? What reasons are advanced? In the first place, a man must be politically strong to win the confidence and support of some man who is strong with the governor, and after this has been determined upon, the candidate then gets an indorsement from some committee of some bar association, and the people are deceived by a statement that the bar association of some city or country indorses the man to the governor, when as a matter of fact it is a small committee who never consult anybody else in this particular bar association. Can members possibly urge that we are receiving thereby the best service that could be given to us? I believe that the judicial systems, whether elective or appointed, in other states, which produce lawyers, like Charles E. Hughes, Alton B. Parker, Elihu Root and Joseph H. Choate, and the great leader of the bar who has just died, John G. Johnson of Philadelphia, and all the great galaxy of names that has come down from the early days of the republic to the present time, stand forth as a most convincing argument that the best lawyers and the best judges are developed under systems different from ours.

But then you will hear friends of the judges say: "Oh, we must not touch the courts." They used that same old argument, when in the Convention of 1853, they resisted the movements from the people to take the district attorneys and sheriffs away from the appointive power of the governor and make them elective. "Oh, you cannot have clerks of courts in politics," they said. "You cannot have the district attorney in politics. You cannot have the sheriff in politics. The unholy hand of politics will tear down our temples of justice if these servants of the people are considered in a political way." Massachusetts would not stand for that argument and

the people soon after accepted the recommendation of electing these officials and gave up forever the system of appointing district attorneys and sheriffs and clerks of courts and registrars of deeds and probate, and the people would not change back today, as you all very well know, because Massachusetts is satisfied that her elected district attorneys, her elected clerks of court, her elected registrars of probate and deeds, do perform their duties just as honestly, just as intelligently, just as faithfully, and just as well as any man who might be appointed by any governor at the suggestion of the governor's political associates.

Now, I am not at this time urging the election of judges or the appointment of judges. I am calling your attention to some of the reasons and arguments that ought to influence men in this convention to pause before they write into this initiative and referendum resolution an all-sweeping clause and exception that would exempt from its operation all questions concerning the appointment, qualification, tenure, removal, or compensation of judges, or the powers, creation, or abolition of courts. I have mentioned briefly some points that to my mind are convincing that there may be good reasons at some time for wanting to change our system. The question of whether we will have an elective judiciary or an appointive judiciary is not before the convention at this time. It will come up when we reconvene next summer. All that I am insisting upon at this time is that it is an insult to the people to take from the operation of any law which they wish to make a whole branch of government. All power comes from the people, and any attempt to deny them is a violation of the principles of our republican form of government, and this convention will do them a grave wrong when it attempts to deny the people such rights.

This resolution as it came from the committee originally, as set forth in Document No. 335, had as the only

excluded matter the following: "No law, the operation of which is restricted to a town, city, or other political division of the commonwealth, shall be subject to such initiative petition." This convention, all through its general debate and through the first reading, never dreamt that this all-sweeping exception introduced by the gentleman from Fall River ever would be inserted, and in all fairness, I protest that, in the closing days of the convention, to suddenly insert this extremely important exception is unfair to the friends of the initiative and referendum, and no true friend of this doctrine can logically stand for such an exception, and I call upon them to vote to strike it out of the measure.

The courts of this commonwealth are of paramount importance to the people. People of this commonwealth are more jealous of their courts than of any other department of our government. They want the very best obtainable. They do not wish to be handicapped by any law which does not insure the very best.

I want a judiciary that always will be the very highest in this union. I want a bench that has no weak members. I want men of the highest possible judicial attainments; and it is only to make our bench stronger and better that I urge you not to write into this measure an exception that will make our judges more independent of the people and thereby invite them to become arrogant. I believe, with John Adams, that a republic is a government "in which the people have an essential share in the sovereignty." I cannot forget the thought of the best beloved exponent of democracy ever produced in this commonwealth, Samuel Adams, who said in a letter to John Adams on October 4, 1790: "The best formed constitutions that have yet been construed by the wit of man have and will come to an end because the kingdoms of earth have not been governed by reason."

With these thoughts in mind can men deliberately

act for the purpose of making it practically impossible to improve or correct or readjust our judicial system?

I call upon you gentlemen here today who believe in the principle of the initiative and referendum to stand up in your manhood and proclaim that the judiciary shall not be excluded from this measure. Let us save the initiative and referendum, if we will, but let us have it in such a form that it shall be full of meaning. Do not go back on your honest convictions at this time. Let us forget the fact that there are one hundred and fifty-one lawyers in this convention. Let us forget the fact that one-tenth of those at least are judges themselves who are voting in their own favor when they vote to exclude judges from the operation of this measure. Forget the fact that there are judges on the bench who possibly may not like what you and I may do today, but stand up like men of Massachusetts and as lawyers who are faithful to our oath, vote as our conscience and our judgment and our intelligence dictate.

THE ELECTION OF FEDERAL JUDGES BY THE PEOPLE[1]

When the Constitution of the United States was adopted at Philadelphia, the masses were uneducated and the men in official positions under the state governments were as a rule chosen by the influence of the educated and wealthy few. A representative democracy was an experiment, and there was a frankly expressed fear of committing power to the masses. In only one state was the governor at that time elected by the people, and in none were the judges so chosen. In all there were property qualifications either for the electors of the state senate or of both houses, or for the members themselves of the general assembly, and in some in all these particulars.

[1] By Judge Walter Clark, Chief Justice of the Supreme Court of North Carolina. *Arena*. 32: 457-60. November, 1904.

This state of things was naturally reflected in the Federal Constitution, which still, after the lapse of nearly a century and a quarter, and the demonstrated capacity of the people for self-government, presents in the full blaze of the twentieth century the distrust of popular government which, before its trial, was natural in the men of the eighteenth century. The unnatural thing is, not its adoption in 1787, but the retention, unchanged, of the non-elective features of the Constitution in 1904. The Federal Constitution, framed according to the ideas then prevailing, gave to the people the selection of only one-sixth of the government—the members of the lower house of Congress. The choice of the executive and the judiciary and of the other half of the legislative department, was carefully placed beyond their reach. The Senate was made elective at second-hand by the state legislatures. The President was intended to be elected at third-hand by electors chosen by the state legislatures and the judiciary at fourth-hand by the appointment of the executive so chosen; and to place the judges farther beyond the possibility of responsibility to the people or influence by that popular opinion which is the foundation-stone of a free government, the tenure was for life.

A more complete denial of popular control of the new government could not have been devised. Hamilton would have preferred a hereditary executive. That would not have been as efficient for his purposes as an appointive life judiciary, for we know that the hereditary executive in England has not dared to exercise the veto-power since the revolution of 1688, more than two centuries. But by reason of the power which the judiciary soon besowed upon themselves, by construction, of declaring any statute unconstitutional, the judges have set aside acts of Congress at will. Thus the Legal-Tender Act, the financial policy of the government, was invalidated by one court and then validated by another, when

the personnel of the court had been increased for that purpose. Thus also ten years since the income-tax, which had been held constitutional by the court for a hundred years and after being at first again so held, was by a sudden change of vote by one judge held unconstitutional, nullified and set aside. The result was that $100,000,000 of annual taxes were transferred from those most able to bear them and place upon those least able to bear them, necessarily forcing the retention of the high tariff, which is a tax upon consumption and therefore a tax upon the many. In the ten years which have elapsed since the income tax, passed by both houses of Congress and approved by the President, was thus set aside, this change of front by this one judge has cost the toilers, the producers of this country, $1,000,000,000! Had the court been elective, men not biased in favor of colossal wealth would have filled more seats upon the bench, and if there had been such decision, long ere this, under the tenure of a term of years new incumbents would have been chosen, who, returning to the former line of decisions, would have upheld the right of Congress to control the financial policy of the government in accordance with the will of the people of this day and age, and not according to the shifting views which the court has imputed to language used by the majority of the fifty-five men who met in Philadelphia in 1787. Such methods of controlling the policy of a government are no whit more tolerable than the conduct of the augurs of old who gave the permission for peace or war, for battle or other public movements, by declaring from the flight of birds, the inspection of the entrails of fowls, or other equally wise devices, that the omens were lucky or unlucky—the rules of such divination being in their own breasts and the augurs being always privately informed as to the wishes of those in power.

In England one-third of the revenue is derived from the superfluities of the very wealthy, by the levy of a

graduated income tax. The same system is in force in all other civilized countries. In not one of them would the hereditary monarch venture to veto or declare null such a tax. In this country alone the people, speaking through their Congress and with the approval of the executive, cannot put in force a single measure of any nature whatever with assurance that it shall meet with the approval of the courts; and its failure to receive such ap- approval is fatal for, unlike the veto of the executive, the unanimous vote of Congress (and the income-tax was very near receiving such approval) cannot avail against it.

Such vast power cannot safely be deposited in the hands of any body of men without supervision or control by any other authority whatever. If the President errs, his mandate expires in four years, and his party as well as himself is accountable to the people at the ballot-box for his stewardship. If members of Congress err, they too must account to their constituents. But the judiciary hold for life, and though popular sentiment should change the entire personnel of the other two great departments of government, a whole generation must pass away before the people could get control of the judiciary, which possesses an irresponsible and unrestricted veto upon the action of the other departments—irresponsible because impeachment has become impossible, and if it were possible it could not be invoked as to erroneous decisions, unless corruption were shown.

In the state governments the conditions existing in 1787 have long since been changed. In all the states the governors and the members of the general assemblies have long since been made elective by manhood suffrage. In all the forty-five states, save four (Delaware, Massachusetts, New Hampshire and Rhode Island), the judges hold for a term of years, and in three of these they are removable (as in England) upon a majority vote of the

legislature, thus preserving a supervision of their conduct which is utterly lacking as to the Federal judiciary. In Rhode Island the judges were thus dropped summarily, once, when they had held an act of the legislature invalid. In thirty-three states the judges are elected by the people, in five states by the legislature and in seven states they are appointed by the governor with the consent of the senate. Even in England the judges hold office subject to removal upon the vote of a bare majority in Parliament—though there the judges have never asserted any power to set aside an act of Parliament. There the will of the people, when expressed through their representatives in Parliament, is final. The King cannot veto it, and no judge ever dreamed he had power to set it aside. Professor Bryce overlooked these essential differences in avowing his preference for a life-tenure, appointive judiciary in this country.

A greater power, however, is claimed and has been often asserted by the judges in this country. Subject to no supervision or revisal from any source, it is absolute power. If the Federal judges were elective, and for a term of years, as state judges have become, there would be the corrective force of public opinion, which could select judges at the expiration of such term more considerate of the policy in public matters which is approved by the statutes enacted; while in all private litigation elective judges would be altogether as efficient as if appointed for life.

Given by the Constitution of 1787 the choice of only one-sixth of the government—the lower house of Congress—the people soon forced the transfer of the choice of presidential electors to their arbitrament and then by common consent the electors were made mere figureheads, compelled to vote for the candidate for President whose name is placed at the head of the ballot on which the electors are voted for. Legally each elector is free

to vote for whom he pleases, but no elector has ever dared violate the implied order given him at the ballot-box. Thus, without changing a letter in the Constitution, the people early captured the Executive Department and practically vote direct for President and Vice-president.

For years a similar struggle has gone on to secure the election of United States senators by the people. At least four times the House of Representatives has passed a bill to amend the Constitution to provide for the election of senators by the people, and each time the vote was either unanimous or practically so. The measure has, however, never passed the Senate, which is to a large extent filled, as the Federal judiciary is, by the influence of corporate power of the attorneys of those corporations. The bill to elect senators by the people has not been defeated directly, but by the chloroform process of referring the bill to some committee which shall not report it for a vote thereon in the open Senate. In many states it has been sought to attain the same end by nominating the senators by a state primary or state convention, and pledging the legislative candidates to vote for such nominees. This is unsatisfactory, for the large and increasing number of newspapers which are owned or controlled by corporate wealth antagonize any method save the election of the legislature, whose limited number makes the choice of a senator by them more easy of control by dexterous manipulation.

But by far the more serious defect and danger in the Constitution is the appointment of judges for life, subject to confirmation by the Senate. So far as corporate wealth can exert influence, either upon the President or the Senate, no judge can take his seat upon the Federal bench without the approval of allied plutocracy. It is not charged that such judges are corruptly influenced. But they go upon the bench knowing what influence procured their appoint-

ment, or their confirmation, and usually with a natural and perhaps unconscious bias from having spent their lives at the bar in advocacy of corporate claims. Having attempted as lawyers to persuade courts to view debated questions from the standpoint of aggregated wealth, they often end by believing sincerely in the correctness of such views, and not unnaturally put them in force when in turn they themselves ascend the bench. This trend in Federal decisions has been pronounced. Then, too, incumbents of seats upon the Federal circuit and district bench cannot be oblivious to the influence which procures promotion; and how fatal to confirmation by the plutocratic majority in the Senate is the expression of any judicial views not in accordance with the "safe, sane and sound" predominance of wealth.

As far back as 1820, Mr. Jefferson had discovered the "sapping and mining," as he termed it, of the life-tenure, appointive Federal judiciary owing no gratitude to the people for their appointment and fearing no inconvenience from their conduct, however arbitrary, in the discharge of such office. In short, they possess the autocratic power of absolute irresponsibility. "Step by step, one goes very far," says the French proverb. This is true of the Federal judiciary. Compare their jurisdiction in 1801, when Marshall ascended the bench, and their jurisdiction in 1904. The Constitution has been remade and rewritten by the judicial glosses put into it. Had it been understood in 1787 to mean what it is construed to mean today, it is safe to say that not a single state would have ratified it. This is shown by the debates in the state conventions, in many of which the bare possibility of much less objectionable construction was bitterly denied and yet nearly caused defeat of ratification. In 1822, in his letter to Mr. Barry, Mr. Jefferson said that it was imperative that the United States judges should be made elective for a term of years, and suggested six years as the period.

The tenure of judges for a term of years is the popular will and judgment as is shown by the adoption of that method in forty-one states. It has worked satisfactorily in these states, else they had returned to the appointive life-tenure. The latter system of selecting the United States judges has not been satisfactory. It lends itself to the appointment of corporation attorneys, whose natural bias, however honest they may be, is adverse to any ruling that will conflict with the views maintained by them while at the bar. The life-tenure is especially objectionable, because the conduct of the judge is beyond review by any authority. A more autocratic and utterly irresponsible authority nowhere exists than that of the United States judges, clothed with the power to declare void acts of Congress and rendered by life-tenure free from any supervision by the people or any other authority whatever.

An elective judicary is less partisan, for in many states, half the judges are habitually taken from each party and very often in other states the same men are nominated by both parties, notably the recent selection by a Republican convention of a Democratic successor to Judge Parker. The people are wiser than the appointing power which viewing judgeships as patronage has with scarcely an exception filled the Federal bench with appointees of its own party. Public opinion, which is the corner-stone of free government, has no place in the selection or supervision of the judicial augurs who assume power to set aside the will of the people when declared by Congress and the executive. Whatever their method of divination, equally with the augurs of old they are a law to themselves and control events. A people's destiny should always be in their own hands.

As was said by a great lawyer lately deceased, Judge Seymour D. Thompson, in 1891 (25 *American Law Review, page* 288): "If the proposition to make the Federal judiciary elective instead of appointive is once

seriously discussed before the people, *nothing can stay the growth of that sentiment,* and it is almost certain that every session of the Federal Supreme Court will furnish material to stimulate that growth."

Great aggregations of wealth know their own interests, and it is very certain that there is no reform and no constitutional amendment that they will oppose more bitterly than this. What, then, is the interest of all others in regard to it?

ELECT THE JUDICIARY[1]

And now we come to the most important of the changes necessary to place the government of the union in the hands of the people. By far the most serious defect and danger in the Constitution is the appointment of judges for life, subject to confirmation by the Senate. It is a far more serious matter than it was when the Convention of 1787 framed the Constitution. A proposition was made in the convention—as we now know from Mr. Madison's *Journal*—that the judges should pass upon the constitutionality of acts of Congress. This was defeated June 4, receiving the vote of only two states. It was renewed no less than three times, *i.e.,* on June 6, July 21, and finally again for the fourth time on August 15; and though it had the powerful support of Mr. Madison and Mr. James Wilson, at no time did it receive the votes of more than three states. On this last occasion (August 15) Mr. Mercer thus summed up the thought of the convention: "He disapproved of the doctrine, that the judges, as expositors of the Constitution, should have authority to declare a law void. He thought laws ought to be well and cautiously made, and then to be incontrovertible."

Prior to the convention, the courts of four states,

[1] By Judge Walter Clark, Chief Justice of the Supreme Court of North Carolina. *Arena.* 37: 149-54. February, 1907.

New Jersey, Rhode Island, Virginia and North Carolina, had expressed an opinion that they could hold acts of the legislature unconsitutional. This was a new doctrine never held before (nor in any other country since) and met with strong disapproval. In Rhode Island the movement to remove the offending judges was stopped only on a suggestion that they could be "dropped" by the legislature at the annual election, which was done. The decisions of these four states were recent and well-known to the convention. Mr. Madison and Mr. Wilson liked the new doctrine of the paramount judicary, doubtless deeming it a safe check upon legislation to be operated only by lawyers. They attempted to get it into the Federal Constitution in its least objectionable shape—the judicial veto before final passage of an act, which would save time and besides would enable the legislature to avoid the objection raised. But even in this diluted form, and though four times presented by these two very able and influential members, the suggestion of a judicial veto at no time received the votes of more than one-fourth of the states.

The subsequent action of the Supreme Court in assuming the power to declare acts of Congress unconstitutional was without a line in the Constitution to authorize it, either expressly or by implication. The Constitution recited carefully and fully the matters over which the courts should have jurisdiction, and there is nothing, and after the above vote four times refusing jurisdiction there could be nothing, indicating any power to declare an act of Congress unconstitutional and void.

Had the convention given such power to the courts, it certainly would not have left its exercise final and unreviewable. It gave the Congress power to override the veto of the President, though that veto was expressly given, thus showing that in the last analysis the will of people, speaking through the legislative power, should govern. Had the convention supposed the courts would

assume such power, it would certainly have given Congress some review over judicial action and certainly would not have made the judges irretrievably beyond "the consent of the governed" and regardless of the popular will by making them appointive and further clothing them with the undemocratic prerogative of tenure for life.

Such power does not exist in any other country and never has. It is therefore not essential to our security. It is not conferred by the Constitution, but, on the contrary, the convention, as we have seen, after the fullest debate, four times, on four several days, refused by a decisive vote to confer such power. The judges not only have never exercised such power in England, where there is no written constitution, but they do not exercise it in France, Germany, Austria, Denmark, or in any other country which, like them, has a written constitution.

A more complete denial of popular control of this government could not have been conceived than the placing of such unreviewable power in the hands of men not elected by the people and holding office for life. The Legal Tender Act, the financial policy of the government, was invalidated by one court and then validated by another, after a change in its *personnel.* Then the income tax, which had been held constitutional by the court for a hundred years, was again so held, and then by a sudden change of vote by one judge it was held unconstitutional, nullified and set at naught, though it had passed by a nearly unanimous vote of both houses of Congress, containing many lawyers who were the equals if not the superiors of the vacillating judge, and had been approved by the President and voiced the will of the people. This was all negatived (without any warrant in the Constitution for the court to set aside an act of Congress) by the vote of one judge: and thus $100,000,000, and more, of annual taxation, was trans-

ferred from those most able to bear it and placed upon the backs of those who already carried far more than their fair share of the burdens of government. Under an untrue assumption of authority given by thirty-nine dead men one man nullified the action of Congress and the President and the will of seventy-five million of living people, and in the thirteen years since has taxed the property and labor in the country, by his sole vote, $1,300,000,000, which Congress, in compliance with the public will and relying on previous decisions of the court, had decreed should be paid out of the excessive incomes of the rich.

In England one-third of the revenue is derived from the superfluities of the very wealthy, by the levy of a graduated income-tax, and a graduated inheritance-tax, increasing the per cent with the size of the income. The same system is in force in all other civilized countries. In not one of them would the hereditary monarch venture to veto or declare null such a tax. In this country alone, the people, speaking through their Congress, and with the approval of the executive, cannot put in force a single measure of any nature whatever with assurance that it shall meet with the approval of the courts; and its failure to receive such approval is fatal, for, unlike the veto of the executive, the unanimous vote of Congress (and the income tax came near receiving such vote) cannot avail against it. Of what avail shall it be that Congress has conformed to the popular demand and enacted a "rate regulation" bill and the President has approved it, if five lawyers, holding office for life and not elected by the people, shall see fit to destroy it, as they did the income tax law? Is such a government a reasonable one, and can it be longer tolerated after one hundred and twenty years of experience have demonstrated the capacity of the people for self-government? If five lawyers can negative the will of one hundred million of men, then the art of government is reduced to the selection of those five lawyers.

A power without limit, except in the shifting views of the court, lies in the construction placed upon the Fourteenth Amendment, which passed, as every one knows, solely to prevent discrimination against the colored race, has been construed by the court to confer upon it jurisdiction to hold any provision of any statute whatever "not due process of law." This draws the whole body of the reserved rights of the states into the maelstrom of the Federal courts, subject only to such forbearance as the Federal Supreme Court of the day, or in any particular case, may see fit to exercise. The limits between state and Federal jurisdiction depend upon the views of five men at any given time; and we have a government of men and not a government of laws, prescribed beforehand. At first the court generously exempted from its veto, the police power of the several states. But since then it has proceeded to set aside an act of the legislature of New York restricting excessive hours of labor, which act had been sustained by the highest court in that great state. Thus labor can obtain no benefit from the growing humanity of the age, if such statute does not meet the views of five elderly lawyers, selected by influences naturally antagonistic to the laboring classes and whose training and daily associations certainly cannot incline them in favor of restrictions upon the power of the employer.

The preservation of the autonomy of the several states and of local self-government is essential to the maintenance of our liberties, which would expire in the grasp of a consolidated despotism. Nothing can save us from this centripetal force but the speedy repeal of the Fourteenth Amendment or a recasting of its language in terms that no future court can misinterpret it.

The vast political power now asserted and exercised by the court to set aside public policies, after their full determination by Congress, cannot safely be left in the hands of any body of men without supervision or control

by any other authority whatever. If the President errs, his mandate expires in four years, and his party as well as himself is accountable to the people at the ballot-box for his stewardship. If members of Congress err, they too must account to their constituents. But the Federal judiciary hold for life, and though popular sentiment should change the entire *personnel* of the other two great departments of government, a whole generation must pass before the people could get control of the judiciary, which possesses an irresponsible and unrestricted veto upon the action of the other departments—irresponsible because impeachment has become impossible, and if it were possible it could not be invoked as to erroneous decisions, unless corruption were shown.

The control of the policy of government is thus not in the hands of the people, but in the power of a small body of men not chosen by the people, and holding for life. In many cases which might be mentioned, had the court been elective, men not biased in favor of colossal wealth would have filled more seats upon the bench, and if there had been such decision as the income tax, long ere this, under the tenure of a term of years, new incumbents would have been chosen, who, returning to the former line of decisions, would have upheld the right of Congress to control the financial policy of the government in accordance with the will of the people of this day and age, and not according to the shifting views which the court has imputed to language used by the majority of the fifty-five men who met in Philadelphia in 1787. Such methods of controlling the policy of a government are no whit more tolerable than the conduct of the augurs of old who gave the permission for peace or war, for battle or other public movements, by declaring from the flight of birds, the inspection of the entrails of fowls, or other equally wise devices, that the omens were lucky or unlucky—the rules of such divination being in their own breasts and hence their decisions beyond remedy.

It may be that this power in the courts, however illegally grasped originally, has been too long acquiesced in to be now questioned. If so, the only remedy which can be applied is to make the judges elective, and for a term of years, for no people can permit its will to be denied, and its destinies shaped, by men it did not choose, and over whose conduct it has no control, by reason of its having no power to change them and select other agents at the close of a fixed term.

Every Federal judgeship below the Supreme Court can be abolished by an act of Congress, since the power which creates a Federal district or circuit can abolish it at will. If Congress can abolish one, it can abolish all. Several districts have from time to time been abolished, notably two in 1801; and we know that the sixteen circuit judges created by the Judiciary Act of 1801 were abolished eighteen months later.

It is true that under the stress of a great public sentiment every United States district and circuit judge can be legislated out of office by a simple act of Congress, and a new system recreated with new judges. It is also true, as has been pointed out by distinguished lawyers, that while the Supreme Court cannot be thus abolished, it exercises its appellate functions "with such exceptions and under such regulations as Congress shall make" (Constitution, Art. III., sec. 2), and as Congress enacted the judiciary act of 1789, it has often amended it, and can repeal it. Judge Marshall recognized this in Marbury *vs.* Madison, in which case an *obiter* opinion he had asserted the power to declare an act of Congress unconstitutional, for he wound up by refusing the logical result, the issuing of the mandamus sought, because Congress has not conferred jurisdiction upon the Supreme Court to issue it.

In 1831 the attempt was made to repeal section 25 of the Judiciary Act of 1789, by virtue of which writs of error lay to the state supreme courts in

certain cases. Though the section was not repealed, the repeal was supported and voted for by both Henry Clay, James K. Polk, and other leaders of both of the great parties of that day. But what is needed is not the exercise of these powers which Congress undoubtedly possesses and in an emergency will exercise, but a constitutional revision by which the Federal judges, like other public servants, shall be chosen by the people for a term of years.

It may be said that the Federal judges are now in office for life and it would be unjust to dispossess them. So it was with the state judges in each state when it changed from life judges to judges elected by the people; but that did not stay the hand of a much-needed reform.

It must be remembered that when our Federal Constitution was adopted in 1787, in only one state was the governor elected by the people, and the judges in none, and that in most, if not all, the states, the legislature, especially the senate branch, was chosen by a restricted suffrage. The schoolmaster was not abroad in the land, the masses were illiterate and government by the people was a new experiment and property-holders were afraid of it. The danger to property rights did not come then, as now, from the other direction—from the corporations and others holding vast accumulations of capital and by its power threatening to crush those owning modest estates.

In the state governments the conditions existing in 1787 have long since been changed. In all the states the governor and the members of both branches of the legislature have long since been made elective by manhood suffrage. In all the forty-five states save four (Delaware, Massachusetts, New Hampshire and Rhode Island), the judges now hold for a term of years, and in three of these they are removable (as in England) upon a majority vote of the legislature, thus preserving a supervision of their conduct which is utterly lacking as

to the Federal judiciary. In Rhode Island the judges were thus dropped summarily, once, when they had held an act of the legislature invalid. In thirty-three states the judges are elected by the people, in five states by the legislature, and in seven states they are appointed by the governor with the consent of the senate. Even in England the judges hold office subject to removal upon the vote of a bare majority in Parliament—though there the judges have never asserted any power to set aside an act of Parliament. There the will of the people, when expressed through their representatives in Parliament, is final. The King cannot veto it, and no judge has ever dreamed he had the power to set it aside.

There are those who believe and have asserted that corporate wealth can exert such influence that even if judges are not actually selected by the great corporations, no judge can take his seat upon the Federal bench if his nomination and confirmation are opposed by the allied plutocracy. It has never been charged that such judges are corruptly influenced. But the passage of a judge from the bar to the bench does not necessarily destroy his prejudices or his predilections. If they go upon the bench knowing that this potent influence is not used for them, at least withheld its opposition to their appointment, or their confirmation, and usually with a natural and perhaps unconscious bias from having spent their lives at the bar in advocacy of corporate claims, this will unconsciously, but effectively, be reflected in the decisions they make. Having attempted as lawyers to persuade courts to view debated questions from the standpoint of aggregated wealth, they often end by believing sincerely in the correctness of such views, and not unnaturally put them in force when in turn they themselves ascend the bench. This trend in Federal decisions has been pronounced. Then, too, incumbents of seats upon the Federal circuit and district bench cannot be oblivious to the influence which procures promotion; and how

fatal to confirmation by the plutocratic majority in the Senate will be the expression of any judicial views not in accordance with the "safe, sane and sound" predominance of wealth.

As far back as 1820, Mr. Jefferson had discovered the "sapping and mining," as he termed it, of the life-tenure appointive Federal judicary, owing no gratitude to the people for their appointment and fearing no inconvenience from their conduct, however arbitrary, in the discharge of such office. In short, they possess the autocratic power of absolute irresponsibilty. "Step by step, one goes very far," says the French proverb. This is true of the Federal judiciary. Compare their jurisdiction in 1801, when Marshall ascended the bench, and their jurisdiction in 1906. The Constitution has been remade and rewritten by the judicial glosses put upon it. Had it been understood in 1787 to mean what it is construed to mean today, it is safe to say that not a single state would have ratified it.

An elective judiciary is less partisan, for in many states half the judges are habitually taken from each party, and very often in other states the same men are nominated by both parties, as notably the recent selection by a Republican convention of a Democratic successor to Judge Parker. The organs of plutocracy have asserted that in one state the elective judges are selected by the party boss. But they forget that if that is true, he must in such a condition of affairs name the governor too, and through the governor he would select the appointive judges. If the people are to be trusted to select the executive and the legislature, they are fit to select the judges. The people are wiser that the appointing power which, viewing judgeships as patronage, has with scarcely an exception filled the Federal bench with appointees of its own party. Public opinion, which is the corner-stone of free government, has no place in the selection or supervision of the judicial augurs who as-

sume power to set aside the will of the people when declared by Congress and the executive. Whatever their method of divination, equally with the augurs of old they are a law unto themselves and control events.

As was said by a great lawyer lately deceased, Judge Seymour D. Thompson, in 1891 (25 *American Law Review*, page 288) : "If the proposition to make the Federal judiciary elective instead of appointive is once seriously discussed before the people, *nothing can stay the growth of that sentiment*, and it is almost certain that every session of the Federal Supreme Court will furnish material to stimulate that growth."

Great aggregations of wealth know their own interests, and it is very certain that there is no reform and no constitutional amendment that they will oppose more bitterly than this. What, then, is the interest of all others in regard to it?

BRIEF EXCERPTS

It is true that politics have played a part even when judges have been appointed.—*William H. Taft. Popular Government. p.* 195.

An elective judiciary is less partisan.—*Walter Clark, Chief Justice Supreme Court of North Carolina. Arena.* 31 : 460. *November,* 1904.

Those attacking the elective method have offered no conclusive, or even relevant, evidence from American history to support the contention that it is a failure.—*William Denman. Proceedings First Annual Convention of the California Bar Association,* 1910. *p.* 101.

The people are wiser than the appointing power, which, viewing judgeships as patronage, has with scarcely an exception filled the federal bench with appointees of its own party.—*Walter Clark, Chief Justice of the*

Supreme Court of North Carolina. Arena. 32:460. *November,* 1904.

We favor such amendment to the constitution as may be necessary to provide for the election of all Federal judges, without party designation, for fixed terms not exceeding ten years, by direct vote of the people.—*The Platform of the Progressive* [*La Folette-Wheeler*] *Party.* 1924.

"If you steal $10 you go to jail, but if you steal a million you go to Europe," declared Police Judge Heffernan, of Youngstown, Ohio. "I'm tired of seeing the constant prosecution of small-time law-breakers,' while the criminals who are really cleaning up in big swindles and other illegitimate practices go unmolested."—*Cleveland Press. February* 12, 1926.

A more autocratic and utterly irresponsible authority nowhere exists than that of the United States judges, clothed with the power to declare void acts of Congress and rendered by life tenure free from any supervision by the people or any other authority whatever.—*Walter Clark, Chief Justice Supreme Court of North Carolina. Arena.* 32:460. *November,* 1904.

If the proposition to amend our judicial institutions so as to make the federal judiciary elective instead of appointive is once seriously discussed before the people, nothing can stay the growth of that sentiment; and it is almost certain that every session of the federal supreme court will furnish material to stimulate its growth. *Judge Seymour D. Thompson. American Law Review.* 25:288-9. *April,* 1891.

It is true that the elective judges are interested in politics, are united with and are laboring for the success of the principles of one party. This is their duty as it is

that of every citizen. But if this is a crime, it is counterbalanced by a like evil on the part of the judges appointed, for almost universally these judges are taken from the active ranks of the dominant party, and a majority of them owe their position directly to their political influence.—*Western Jurist.* 8: 523. *September,* 1874.

Where the law provides for the appointing of a judge, it has been done by the governor. Appointments made by politicians such as usually occupy the executive position have the objection that the officers are not removed from politics, but probably are more involved therein than if the judges were elected by the people, and this has the additional objection that the judges so appointed are to some extent subservient to the executive. —*Oscar A. Trippet. Proceedings of the First Annual Convention of the California Bar Association,* 1910. *p.* 45.

The subserviency of the appointed judiciary of this country to the demands and interests of the great corporate trusts is such as will effectually tend to prevent the system of appointing ever being resorted to in the states. In the earlier days of the republic judges were universally appointed, not elected. In nearly all of the states the appointive system has been abandoned for the elective. The people will never be induced to return to the former.—*Frank H. Graves. Proceedings of the Sixth Annual Session of the Washington State Bar Association,* 1894. *p.* 91.

Our federal judiciary with its life tenure is far from showing in its history that putting a judge in for life extinguishes in him partisan temper. . . . No! To give a judge tenure does not lessen the effect of political prejudice on his convictions. Unlimited power with responsibility, such as is conferred by life tenure, with a certainty

of liability to impeachment by a busy Congress, is too great a temptation for many judges to follow the bias of their political training. The Supreme Court of the United States has been successively possessed by three distinct phases of political opinion.—*Boyd Winchester. Green Bag.* 12:621. *December,* 1900.

If the new constitution [of 1851] be adopted, the judges will be chosen by the people. This is an experiment in Ohio, but in view of the appointment of judicial officers by the legislative for the last few years we have reason to hope that the people will make wiser and far better selections. Indeed, the whole people can have but one motive; and if they fail in the selection of good men, it will be by mistake and not design. Intrigue, combination, and faction which oftentimes prove so potent with small bodies of men, are powerless with the whole mass of voters. The mass of the people can have no motives except to choose the best men.—*Western Law Journal.* 8:423. *June,* 1851.

I am not prepared to say that appointment by governors in results compares favorably with what is attained through popular elections. While white supremacy was imperiled in the alluvial portions of some of the southern states, provisions were inserted in the constitutions making all judicial officers appointive by the governors. By a series of singular coincidences the strongest judges have not in recent years happened to support the successful gubernatorial aspirants in those states, and the bench, while honest and deserving, does not measure up in point of ability to the standard prevailing in the sister states of the south.—*W. C. Fitts. Proceedings of the Twenty-eighth Annual Session of the Texas Bar Association.* 1909. *p.* 135-6.

In New York judges were appointed until about 1846, when there was a popular upheaval and the con-

stitution was changed, and they have ever since been elective, with the exception of some of the minor courts. The advantges of the two methods is (*sic*) an open question. The arguments in favor of appointment are that it makes for an independent judiciary and that it secures better men for the bench, whereas the other does not, because the highest class lawyer will not go through the turmoil and supposed degradation of a political campaign. These arguments are not sound. The argument for the election of judges is that it keeps the bench more humane, modern, and in touch with the will of the people. The one is the aristocratic idea, the other the democratic. —*Frederic D. Wells. The Man in Court. p.* 45-6.

I favor the election of the judges of our courts by the people for two good reasons: First. The people are the source of all power, and the exercise of this power in the selection of judges, as in other officers who serve them, is simply the exercise of the right of self-government. Second. The judiciary in our own state of Virginia has been a part of a political machine. The judges are vested with the appointment of members of the electoral board, who select the judges, clerks, and registrars of election; and the judges of our courts are drawn into every sharp political contest, whether they would have it so or not. Probably the easiest means of political preferment in Virginia would be to be appointed a judge as a return for valuable political service, improve the Democratic machine while a judge, and watch for opportunities to go higher up in politics. I hope and believe that Virginia will soon align herself with those States in the Union that believe in popular government and where the people really control the affairs of their government, as they cetrainly do not in the grand and historic Commonwealth of Virginia.—*C. Bascom Slemp. Congressional Record Appendix.* 54:698. *March* 2, 1917.

Neither can, in my judgment, a remedy be found in the appointment of the judges of the executive, either with or without the advice and the consent of the senate. More care and thought might thereby be given to their selection, but I doubt if more honesty. I can but think that our courts would in a quarter of a century become fixed and guarded strongholds of the corporate and trust power more certainly and more unvaryingly. The history of the judiciary appointments in the earlier days of the republic, when nearly all judges were appointed by the chief executive of the state, clearly indicates this; and, if I may be permitted to digress so far, I should say that the experience of the nation in the appointment in the federal judiciary confirms this view. Four months ago the *American Law Review* said that its editors were told by a distinguished senator of the United States that no judicial appointment could be made, or at least ratified, against the opposition of the great railroad corporations in the nation. But of this there can be no doubt that the Federal judiciary as a rule is the stronghold of corporate influence and overreaching.—*Frank H. Graves. Proceedings of the Washington State Bar Association,* 1894. *p.* 90.

Suppose it is left to the executive to appoint the judges. He is one man, personally unknown to the masses. He is burdened with thousands of cares. He can give no considerable time to investigation regarding the men he must appoint. He is not acquainted with a sufficient number of good men to fill the offices, and he never was held, never will hold territorial distribution in disregard. He appoints men of whom he has little if any personal knowledge, and without opportunity to consult those best prepared to judge of them. President Taylor had once fully determined to appoint a political friend to the office of Attorney General. He was led to change his determination only upon the assurance of an in-

fluential friend that Daniel Webster and Reverdy Johnson would make a fool of his friend the first time they met him in the Supreme Court. President Jackson is said by good authority to have appointed Chief Justice Taney for purely political reasons or considerations. How narrowly did we recently escape having appointed to the highest judicial office in the United States a man, the very mention of whose name in that connection roused such a storm of indignation that a clear headed and by no means timid President was induced to reconsider his action.—*H. M. Wiltse. Central Law Journal.* 3: 181. *March* 17, 1876.

When we find ourselves confronted with the obstinate and persisting fact that the plan of an appointive judiciary has not been accorded either favor or adoption by the people, we must conclude that there is some sound reason underlying the persistence of that fact. To my mind the reason is this: The ordinary citizen, or, so to speak, the average man looks upon the courts, and especially the trial courts, as the ultimate bulwark, the final safeguard and stronghold, of his personal liberty, of his rights of property, and of his equality before the law. He therefore considers the court in which he from time to time appears as party or as witness or as juror to be *his* court, and the judge to be *his* judge; and he holds his ballot to be the tie that binds the judge he elects to himself in terms of personal acquaintance, of mutual respect, of friendly interest and of sympathetic regard; and he fears—and hence does not intend—that the plan of an appointive judiciary, will sever this tie. This to my mind is the reason why the plan of an appointive judiciary, which has so many and sound arguments, based in public policy, to support it, has thus far failed of public favor and adoption.—*John E. Richards, Judge of the California District Court of Appeals. Transactions of the Commonwealth Club of California.* 9: 337. *June,* 1914.

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